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Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID ENGLAND,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sentence found to violate due process because it was based on unreliable evidence continues to violate due process when, without making any new findings, the district court imposes the same sentence on remand.

2. Whether a sentence is unreasonable if a defendant who was neither charged with nor convicted of attempted murder is nevertheless sentenced for attempted murder, due to an error in the sentencing guidelines that has since been corrected.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption of the case.

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OPINIONS BELOW

The opinions of the court of appeals are reported at 604 F.3d 460, 555 F.3d 616, and 507 F.3d 581 and are each reproduced in the Appendix to this Petition. The orders of the district court underlying each of the aforementioned appeals were unreported but are reproduced in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on May 6, 2010. Accordingly, the time for filing this Petition is August 4, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes and other materials are discussed in detail in this Petition, each of which is reproduced in the Appendix to this Petition: U.S. Const. Amend. V (App. 72); U.S.S.G. § 2A2.1 (2005) (App. 73); U.S.S.G. § 2J1.2 (2005) (App. 73-74); U.S.S.G. App. C, Amend. 724 (App. 74-75); 18 U.S.C. § 3553 (App. 76-84).

STATEMENT OF THE CASE

On January 6, 2006, Mr. England was convicted of possessing a firearm as a felon (18 U.S.C.

§ 922(g)(1)), attempting to persuade a witness to provide a false alibi (18 U.S.C. § 1512(b)(1)), attempting to cause a witness to conceal evidence (18 U.S.C. § 1512(b)(2)(B)), and threatening physical force against a witness in order to prevent the witness from testifying (18 U.S.C. § 1512(a)(2)(A)). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, as Mr. England was charged with offenses against the laws of the United States. The three obstruction counts all arose out of recorded telephone conversations Mr. England had with members of his family while incarcerated awaiting trial. Count IV – threatening physical force against a witness – arose out of a conversation between Mr. England and his father in which Mr. England asked his father to warn his brother-in-law, Robert Bull, not to testify. Mr. England's father, however, testified that he did not take his son's threats seriously and did not relay the threat to Mr. Bull. Mr. Bull himself also testified that he did not feel threatened by Mr. England and that he believed Mr. England was just "blowing off steam."

At his original sentencing hearing on April 27, 2006, the district court found that, pursuant to the Statutory Index to the 2005 United States Sentencing Guidelines, guideline 2A2.1 applied to Mr. England's Count IV conviction under Section 1512(a)(2)(A) for threatening physical force against a witness. The district court acknowledged that guideline 2J1.2, the guideline for obstruction of justice, was more applicable than guideline 2A2.1, the guideline for

attempted murder: "2J1.2(a) probably is [applicable] because this is only a threat. It's not an attempt that could have been charged or that is the alternate in that section." The district court explained, however, that it was required to apply guideline 2A2.1 to determine Mr. England's advisory guideline range because it was listed in the Guidelines' Statutory Index, while guideline 2J1.2 was not. Application of guideline 2A2.1 for Mr. England's conviction under Count IV resulted in an advisory guideline range of 210 to 262 months. (App. 112). The court then proceeded to sentence Mr. England to 262 months, the top of the guideline range for attempted murder. (App. 114). Had guideline 2J1.2 applied, the advisory guideline range would be 92 to 115 months. (App. 101).

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed Mr. England's convictions, but vacated his sentence and remanded the case back to the district court for resentencing. *United States v. England* ("*England I*"), 507 F.3d 581 (7th Cir. 2007). The Seventh Circuit held, after examining the legislative history for Section 1512, that the absence of guideline 2J1.2 in the Statutory Index was likely the result of a "pernicious scrivener's error" that occurred when Section 1512 was substantially amended, but the Guidelines were not updated to reflect those changes. *Id.* at 591. The Seventh Circuit ultimately held that the district court failed to consider the potential disparity pursuant to 18 U.S.C. § 3553(a)(6), and advised that "the potential disparity that may arise from sentencing a threat

as if it was an attempted murder would be the basis for a variance." *Id.* at 592.

Following the Seventh Circuit's decision, the United States Sentencing Commission (the "Sentencing Commission") amended the Guidelines to include guideline 2J1.2 in the Statutory Index for convictions under section 1512(a). *See* U.S.S.G. App. C, Amend. 724 (eff. Nov. 1, 2008). The Sentencing Commission stated that the purpose of including the "reference to § 2J1.2 (Obstruction of Justice) for a violation of 18 U.S.C. § 1512(a) [was] to reflect the broad range of obstructive conduct, including the use of physical force against a witness, covered by that subsection." *Id.*

Following remand, on June 2, 2008, the district court held another sentencing hearing (the "2008 Resentencing Hearing"). At the 2008 Resentencing Hearing, the district court sentenced Mr. England to 210 months, the low end of the guideline range for attempted murder and almost double the high end of the obstruction of justice guideline range. The district court explained that it would not sentence Mr. England outside the advisory guideline range dictated by guideline 2A2.1 because it believed that Mr. England was "more like" an attempted murderer because had he been released on bond prior to trial, he "would have" committed attempted murder. (App. 103).

Mr. England appealed the 210-month sentence to the Seventh Circuit, which again vacated the sentence, holding that the district court violated Mr.

England's due process rights in finding that he would have committed attempted murder. *United States v. England* ("*England II*"), 555 F.3d 616 (7th Cir. 2009). First, the Seventh Circuit held that "there is no doubt that the district court relied" on this improper finding in imposing Mr. England's sentence. *Id.* at 622. Second, the court held that the district court did not make this finding by a preponderance of the evidence. *Id.* at 623.

On June 4, 2009, the district court conducted another resentencing hearing (the "2009 Resentencing Hearing"). The Government did not introduce any additional evidence and the district court did not make any additional findings to support its earlier conclusion that Mr. England was like an attempted murderer. Nonetheless, the district court sentenced Mr. England to the same 210-month sentence that falls within the attempted murder guideline range and was vacated by the Seventh Circuit for violating Mr. England's due process rights. (App. 87-88). The district court simply adopted its analysis from the 2008 Resentencing Hearing, but stated that it was not considering its improper finding from that hearing and that "those statements had no influence on [its] ultimate decision of imprisonment imposed then or now." (App. 87).

Mr. England appealed this sentence to the Seventh Circuit, which affirmed on May 6, 2010. *United States v. England* ("*England III*"), 604 F.3d 460 (7th Cir. 2010). The Seventh Circuit acknowledged that Mr. England's sentence was "lengthy," but found that

it was not substantively unreasonable. *Id.* at 464. The court stated that "there was confusion" at the 2008 Resentencing Hearing about whether the district court relied on its finding that Mr. England would have committed attempted murder had he not been incarcerated, but that the district court "cleared up that issue" by stating that the district court was not relying on its improper statements. *Id.*

REASONS FOR GRANTING THE PETITION

I. Review is Warranted Because Mr. England's Due Process Rights Have Been Violated

Defendants have a constitutional right to be sentenced on the basis of reliable evidence. *England II*, 555 F.3d at 622; *United States v. Berry*, 553 F.3d 273, 280 (3d Cir. 2009); *see also Hurtado v. California*, 110 U.S. 516, 537 (1884) ("[n]o individual or body of men has a discretionary or arbitrary power to commit any person to prison."). "[T]he application of the preponderance standard at sentencing generally satisfies due process." *United States v. Watts*, 519 U.S. 148, 156 (1997) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986); *Nichols v. United States*, 511 U.S. 738, 747-48 (1994)). In this case, Mr. England was sentenced on the basis of a finding that was wholly unsupported by any reliable evidence and which the Seventh Circuit previously determined violated Mr. England's due process rights.

At the 2008 Resentencing Hearing, the district court justified its decision to sentence Mr. England as an attempted murderer, despite the absence of any charge or evidence of attempted murder, by finding that, had Mr. England been out on bond, he would have attempted to murder a witness:

> [I]f the defendant had been out on bond right after the state charge, a felon in possession, and he was angry with either his family's testimony or he was angry with those four witnesses, I think he would have gone and done something at least to those four witnesses in order to try to persuade them not to testify against him, and I have no doubt that he would have taken a weapon, and that would have been a substantial step that's necessary for an attempt offense of murder. I think he would have gone to what degree of force was necessary to get them to drop the charges against him. Threats, shooting, whatever. And, therefore, in this respect he is more like the attempted murderer than someone who's just one who's obstructing justice.

(App. 103). In *England II*, the Seventh Circuit vacated Mr. England's sentence and found that the district court's finding as to what Mr. England would have done if out on bond violated Mr. England's due process rights. *See England II*, 555 F.3d at 623; *see also* U.S. Const. Amend. V. In vacating the sentence, the Seventh Circuit held that there "was an insufficient quantum of evidence to support the [district]

court's assumption" that Mr. England would have committed attempted murder. *Id.* Furthermore, the Seventh Circuit held that "there is no doubt that the district court relied on its findings that England is akin to an attempted murderer in imposing its 210-month sentence." *Id.* at 622.

At the 2009 Resentencing Hearing, however, the district court imposed the exact same 210-month sentence. The district court did not, however, make any new findings or provide any additional justification for sentencing Mr. England as an attempted murderer. Instead, despite the Seventh Circuit's express holding that the district court relied on its improper finding, the district court simply held that "those statements had no influence on my ultimate decision of imprisonment imposed then or now." (App. 87). In affirming the sentence on appeal, the Seventh Circuit in *England III* stated only that "there was some confusion in the second sentencing hearing about the district court's reliance on a finding that England would have attempted murder had he not been incarcerated. . . ." *England III*, 604 F.3d at 464.

Review is necessary in this case because the district court's failure to either amend the sentence or make additional factual findings to support the 210-month sentence perpetuates the due process violation found in *England II*. At the 2008 Resentencing Hearing, Mr. England was sentenced on the finding that he "would have" committed attempted murder. The district court's failure to either find additional facts or otherwise account for this improper finding

by lowering Mr. England's sentence at the 2009 Resentencing Hearing unquestionably reveals that Mr. England is still being sentenced based on the improper finding as to purely hypothetical conduct. *See Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) ("we conclude that . . . this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law. . . ."). Indeed, the fact that Mr. England continues to be sentenced in the guideline range for attempted murder further reveals that the district court is sentencing Mr. England as if he committed attempted murder.

The district court and the Seventh Circuit have effectively rendered the constitutional error harmless. Here, after the Seventh Circuit found the district court's finding unsupported by reliable evidence, the district court merely removed the words expressing the improper finding, but it did not actually account for the finding in imposing the sentence. Accordingly, Mr. England continues to be denied his due process rights because he was sentenced on the supposition that he "would have" committed attempted murder – a crime for which he was never even charged and would not have been at issue in this case but for the error in the 2005 Guidelines.

II. The Petition Should Be Granted Because Mr. England's Sentence Is Based on an Error in the Guidelines

This Court should grant this Petition because, due to what the Seventh Circuit described as a "pernicious scrivener's error" in the 2005 United States Sentencing Guidelines ("2005 Guidelines"), Mr. England has been sentenced for a crime for which he was neither charged nor convicted and his sentence is nearly double what it would be but for the error in the Guidelines. In *United States v. Booker*, this Court held that the Sentencing Guidelines were advisory, rather than mandatory on district courts. 543 U.S. 220, 245 (2005). Nevertheless, the district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007). The district court, however, may not presume that a sentence within an advisory guideline range is reasonable. *Rita v. United States*, 551 U.S. 338, 351 (2007). After calculating the applicable guideline range, the district court should provide an opportunity for both parties to argue for a particular sentence and "then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Gall*, 552 U.S. at 49-50. The district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* at 51. In this case, the district court calculated the guideline range based on an error in the 2005 Guidelines. Despite

holding three sentencing hearings, the district court refused to sentence Mr. England outside of the erroneous guideline range or adequately justify why such a range was reasonable.

The Statutory Index to the 2005 Guidelines does not reference guideline 2J1.2, the guideline for obstruction of justice convictions, for Mr. England's threat conviction under Section 1512(a). Instead it references guideline 2A2.1, among other even less applicable guidelines. U.S.S.G. App. A (2005). The absence of guideline 2J1.2 stems from the 2002 amendment to 18 U.S.C. § 1512. *England I*, 507 F.3d at 591. Before 2002, Section 1512(a) only punished the murder or attempted murder of a witness. *Id.* The 2002 amendment created Section 1512(a)(2), which punishes physical force or the threat of physical force against a witness. *Id.* At the time Mr. England was initially sentenced, however, the Guidelines had not been amended to reflect these statutory changes. *Id.* at 592. As a result of the this oversight, application of the Guidelines resulted in an advisory guideline range of 210 to 262 months. (App. 101). Had the Guidelines been timely amended to reflect the statutory changes, the guideline range would have been 92 to 115 months. (*Id.*)

The Sentencing Commission has since corrected the error in the Guidelines by adding guideline 2J1.2, the guideline for obstruction of justice, to the Statutory Index for convictions under Section 1512(a). In adding the amendment, which became effective November 1, 2008, the Sentencing Commission stated

that a reference to guideline 2J1.2 was being added to the Statutory Index to "reflect the broad range of obstructive conduct, including the use of physical force against a witness, covered by [Section 1512(a)]." U.S.S.G. App. C, Amend. 724. In other words, the Sentencing Commission has reached the conclusion that guideline 2J1.2, the obstruction of justice guideline, rather than guideline 2A2.1, the guideline for attempted murder, is the appropriate guideline for Mr. England's conviction under Count IV. Accordingly, if Mr. England were convicted of the same crimes today, the district court would invariably be required to sentence Mr. England using guideline 2J1.2 for the conviction under Count IV. *See* U.S.S.G. § 1B1.2, App. n. 1 (when multiple guidelines are listed in the Statutory Index for a conviction under a statute, the district court must "determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted.").

Despite the tremendous disparity in the sentencing ranges, despite acknowledging that guideline 2J1.2 is in fact more applicable to Mr. England's conduct, and despite this Court's pronouncement in *Booker* and its progeny that the Guidelines are advisory, the district court has demonstrated an inexorable adherence to the guideline range suggested by the flawed 2005 Guidelines. Indeed, at the first sentencing hearing, the district court stated that it believed guideline 2J1.2, rather than 2A2.1, should cover Mr. England's conduct, but was bound to apply

guideline 2A2.1. *England II,* 555 F.3d at 618. On remand at the 2008 Resentencing Hearing, the district court continued its unwillingness to sentence Mr. England outside the attempted murder guideline range, attempting to justify its sentence by speculating that Mr. England "would have" committed attempted murder had he been out on bond. (App. 103). At the 2009 Resentencing Hearing, the district court again refused to sentence Mr. England outside of the attempted murder guideline range without any explanation as to how Mr. England's conduct makes him akin to an attempted murderer. (App. 87-88).

In *England III*, after twice reversing the district court on procedural grounds, the Seventh Circuit reviewed Mr. England's sentence for substantive reasonableness for the first time. *England III*, 604 F.3d at 464. The court of appeals stated that its "review of the reasonableness of a sentence is necessarily a deferential one." *Id.* After conceding that the sentence was "lengthy," the court held the sentence was "not substantively unreasonable." *Id.*

Both the district court and the court of appeals erred in finding the 210-month sentence reasonable. Mr. England is being sentenced in a guideline range expressly applicable to attempted murder that the Sentencing Commission, by amending the Guidelines, acknowledges is an error. Accordingly, Mr. England is being sentenced as if he committed attempted murder, a crime for which he was never charged, nor convicted. His sentence is also substantially longer than sentences for similar crimes of using threats of

physical force to obstruct justice, which are sentenced in accordance with guideline 2J1.2. *See* 18 U.S.C. § 3553(a)(6) (in imposing a sentence, the district court must consider "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct"). Furthermore, the district court failed to provide justification for sentencing Mr. England to such a substantial sentence. At the 2008 Resentencing Hearing, the district court found that had Mr. England been out on bond, he would have attempted to murder a witness. (App. 103). While the Seventh Circuit vacated this sentence in *England II*, because this finding violated Mr. England's due process rights, the district court merely removed this language from its decision and, without finding any new facts, sentenced Mr. England to the same sentence vacated by the court of appeals. (App. 87-88).

Indeed, Mr. England's 210-month sentence is more than seven years longer than the 92 to 115 months guideline range had guideline 2J1.2 applied. Had the Guidelines been timely amended and properly included guideline 2J1.2 as an applicable guideline for Mr. England's conviction under Count IV, the district court would have required significant justification to vary Mr. England's sentence 95 months higher than the upper limit of the guideline range. *See Gall*, 552 U.S. at 50 ("a major departure should be supported by a more significant justification than a minor one."). Nevertheless, the district court did not provide sufficient justification for such a lengthy

sentence and the Seventh Circuit did not require it. Accordingly, because Mr. England's sentence results in a miscarriage of justice, the Court should grant the Petition.

Respectfully submitted,

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604 F.3d 460

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
David ENGLAND, Defendant-Appellant.
No. 09-2500.

Argued Feb. 19, 2010.
Decided May 6, 2010.

Monica Mallory (argued), Office of the United States Attorney, Rockford, IL, for Plaintiff-Appellee.

Ellen M. Wheeler, Thomas R. Mikrut (argued), Foley & Lardner, LLP, Chicago, IL, for Defendant-Appellant.

Before POSNER, FLAUM, and WOOD, Circuit Judges.

FLAUM, Circuit Judge.

This is the third time we consider David England's appeal of his sentence from his January 6, 2006 conviction. In 2006, England was convicted of possession of a firearm as a felon in violation of 18 U.S.C. § 922(g)(1) (Count I), attempting to persuade a witness to provide a false alibi for him in violation of 18 U.S.C. § 1512(b)(1) (Count II), attempting to cause a witness to conceal evidence in violation of 18 U.S.C. § 1512(b)(2)(B) (Count III), and threatening physical force against a witness to influence his testimony in violation of 18 U.S.C. § 1512(a)(2) (Count IV). We have reversed England's sentence for Count IV on

procedural errors twice. Because the third sentencing hearing did not suffer from the same procedural errors as the prior two, and because England's sentence is substantively reasonable, we now affirm.

Initially, England was charged with being a felon in possession of a firearm when he allegedly broke a car window with the butt of a gun on September 15, 2004. After the initial incident, England engaged in a series of behaviors that earned him three more charges, all relating to obstruction of justice. First, while in custody on the initial charge, England called his sister, Dawn Bull, and asked her to move and cover the car involved in the incident. Then, he called Dawn's husband, Robert Bull, and told Bull to not let anyone use the car. On September 26, 2004, after moving the car, England's mother and Dawn found a blue duffel bag in the engine compartment. They flagged down a police officer who removed the bag and found a bloodied gun inside. The DNA on the gun matched England. When England learned of the discovery of the gun, he became concerned that his mother and sister were cooperating with the police. England called Robert Bull and told him to make sure that his sister and mother "don't get out o' hand" and to "control them women." Later, England asked his sister to corroborate his alibi, saying that he did not "understand why a . . . couple of my family members can't . . . recognize that they were up there at the Barnes and Noble that particular day, and they seen me up there." Dawn refused and England's behavior escalated even further. On December 15, 2004,

England learned that Robert Bull was cooperating with the police. England could not call Robert directly because Robert had blocked his calls. To circumvent this block, England called his father and told his father that he would "put some bullets in somebody's head" and asked his father to talk to Robert "man to man." On December 27, 2004, England asked his father to relay a message to Robert Bull that if he "shows up to court, when I walk outta prison in fifteen years, I'm 'onna fuckin' murder his motherfuckin' ass."

England represented himself during his three-day trial. With respect to Count IV, threatening physical force against a witness in order to influence his testimony, England's father testified that he never relayed the threats to Robert Bull. Robert Bull also testified that England never directly threatened him and that he only learned of the threats through the government. On January 6, 2006, the jury convicted England on all four counts.

At the initial sentencing, Count IV emerged as the main contested issue because it was not clear which guideline section applied to the charge of threatening physical force against a witness. The presentence investigation report recommended that the district court apply U.S.S.G. § 2A2.1, which covers "Assault with Intent to Commit Murder; Attempted Murder" and carries a base offense level of 33. The district court asked the parties to brief the question of whether U.S.S.G. § 2J1.2, which addresses "Obstruction of Justice" and carries a base

offense level of 22, was a better fit with the conduct charged in Count IV. After both parties briefed the issue, the district court, relying on the statutory index in Appendix A of the Guidelines, found that § 2A2.1 was the appropriate guideline because the Appendix did not list § 2J1.2 as a possible guideline for a violation of 18 U.S.C. § 1512(a). The district court acknowledged that the conduct generally covered by § 2A2.1 did not align with the conduct involved in Count IV. However, it found that our holding in *United States v. Lanas*, 324 F.3d 894, 904 (7th Cir.2003), required it to "apply the offense guidelines referenced in the statutory index to the statute of conviction" unless the case fell within a limited exception, which it did not. England's total advisory guideline range using § 2A2.1 for Count IV was 210 months to 262 months. At the sentencing hearing, England presented evidence in an effort to persuade the district court that a shorter sentence was warranted. Nevertheless, the court sentenced England to 262 months, the upper limit of the advisory guideline range.

England appealed his conviction and sentence. We affirmed England's conviction and vacated his sentence. We remanded for resentencing because we found that the absence of guideline § 2J1.2 from the statutory index was likely the result of a "pernicious scrivener's error." *United States v. England*, 507 F.3d 581, 591 (7th Cir.2007) (*England I*). Considering the legislative history of 18 U.S.C. § 1512(a), we reasoned that the error likely occurred because the Sentencing

Commission did not amend the guidelines to match the statutory amendments Congress had made to 18 U.S.C. § 1512(a) in 2002. *Id.* at 591-92. In our instructions for remand, we held that the district court was correct to apply guideline § 2A2.1 because "[r]ather than tinker with the Guidelines sections listed in the statutory index, the district court must typically begin with the offense guideline referenced in the Statutory Index for the statute of conviction." *Id.* at 590. However, we found that this scrivener's error might lead to a disparity among defendants with similar records who have been found guilty of similar behavior because this scheme punished a threat at the same level as an attempted murder. *Id.* at 592. Because the district court did not consider this possible disparity in its initial § 3553(a)(6) analysis, we remanded for resentencing so the district court could properly take this disparity into account. We did not pass any judgment on the reasonableness of the sentence.

Following our decision in *England I*, the United States Sentencing Commission proposed a technical amendment adding guideline § 2J1.2 to the statutory index for convictions under § 1512(a). *See* Sentencing Guidelines for United States Courts, 73 Fed.Reg. 4936 (Jan. 28, 2008). Congress approved these guidelines in May 2008. *See* Sentencing Guidelines for the United States Courts, 73 Fed.Reg. 26,924, 26,936 (May 9, 2008). The Sentencing Commission explained that this amendment "adds a reference to § 2J1.2 (Obstruction of Justice) for a violation of 18

U.S.C. § 1512(a) to reflect the broad range of obstructive conduct, including the use of physical force against a witness, covered by the subsection." *Id.*

At the re-sentencing hearing following *England I*, the district court properly applied § 2A2.1 in calculating the advisory guideline range and then turned to a reconsideration of the § 3553(a) factors, with a special focus on subsection (a)(6). In the new § 3553(a) analysis, the district court considered all the evidence and argument from the original sentencing hearing and the Sentencing Commission's proposed amendment to the statutory index. The district court found that nature and circumstances of the offense were aggravated due to the violent nature of the conduct charged in Count I and England's obstructive behavior. Then, based on findings of a forensic psychologist that the government presented for sentencing purposes, the district court also found that England would likely remain violent and confrontational. In conjunction with the psychological finding, the court found that England was "a person who can be dangerous, especially if angry," and a person willing to go "beyond mere threats." Taking these factors together, the district court concluded that England needed a substantial sentence to deter him from letting his anger get the best of him and because the public needed to be protected from England. Turning to the § 3553(a)(6) analysis, the district court made it clear that it was balancing its consideration of unwarranted sentencing disparity

under subsection (a)(6) with the other factors listed in § 3553(a). It also stated that it could not conduct a full subsection (a)(6) analysis because the parties did not submit evidence of what sentences defendants convicted of similar crimes received. Conducting what subsection (a)(6) analysis it could, the district court found that, in light of the seriousness of the [sic] England's conduct, as well as his psychological characteristics and violent past, the defendant was "more in line with a person who might attempt to murder someone" than the typical offender who obstructs justice. The court expressed the view that, had England been out on bond, he would have tried to harm a witness and he would have used whatever degree of force was necessary to avoid the charges against him. Balancing all of the § 3553(a) factors, including subsection (a)(6), the court determined that a sentence within the advisory guideline range of 210 to 262 months was reasonable and just. The court also stated that if the lower guideline range under § 2J1.2 was applicable, the court would be inclined to vary his sentence upward. Accordingly, the court sentenced England to a total sentence of imprisonment of 210 months, the low end of the advisory range under § 2A2.1.

England appealed the district court's sentence for a second time on the ground that the sentence was substantively unreasonable. We vacated the sentence for a second time based on a procedural error. *United States v. England,* 555 F.3d 616 (7th Cir.2009) (*England II*). In *England II*, we found that the

district court's analysis of the § 3553(a) factors was more than adequate. *Id.* at 621. We also agreed with the district court's statement that it could not conduct a full subsection (a)(6) analysis because the parties had not submitted evidence of sentences received by defendants with similar records who had been found guilty of similar conduct. *Id.* However, we remanded for re-sentencing based on the court's factual finding that England was "more in line with a person who might attempt to murder someone" than the typical offender who obstructs justice. We held that this finding of the district court was not supported by reliable evidence. In reversing, we provided the district court with clear instructions that it "need not repeat [the § 3553(a)] analysis at resentencing; it can adopt the § 3553(a) findings arrived at during the June 2, 2008 hearing. We only require that the district court make its sentencing determination without reliance on a finding that England would have attempted murder if out on bond unless further evidence is adduced which would justify such a conclusion." *Id.* at 623.

At the third sentencing hearing, which is at issue in this appeal, the district court did precisely what we instructed in *England II*. The district court followed our instruction and adopted the § 3553(a) analysis from the second sentencing hearing completely for the purpose of the third sentencing hearing. Then, the district court turned to the issue of whether it could conclude that England would have attempted murder if out on bond. Because the government did not

present additional evidence on this point, the district court found that it could not determine that England would have attempted murder. Without relying on this finding from the second sentencing hearing, the district court still determined that a sentence of 210 months was appropriate in this case. In coming to this conclusion, the district court focused on England's violent temper, as documented by the report of the forensic psychologist, his history of violent assaults, and the violent nature of the conduct for which he was convicted in Count I (brandishing the weapon and smashing a car window with the weapon).

We review a district court's sentencing decision for reasonableness under an abuse of discretion standard. *United States v. Omole,* 523 F.3d 691, 696 (7th Cir.2008). First, we address whether the court made a procedural error, then we turn to consider the substantive reasonableness of the sentence. *United States v. Carter,* 530 F.3d 565, 577 (7th Cir.2008). We have never reached the substantive reasonableness of England's sentence. In *England II,* we explicitly stated that we were not passing judgment on the reasonableness of the sentence, which we said "very well may be reasonable." 555 F.3d at 623. In the third sentencing hearing, the district court corrected the procedural errors from the first two sentencing hearings. Now we are left only to consider the substantive reasonableness of the sentence.

The sentence imposed by the district court is lengthy, but it is not substantively unreasonable. The

district court properly calculated the guideline range at the time of sentencing. The district court then considered the sentencing disparities that could arise from the possible scrivener's error that equated violations of 18 U.S.C. § 1512(a) only with the attempted-murder guideline rather than the obstruction-of-justice guideline. Although there was confusion in the second sentencing hearing about the district court's reliance on a finding that England would have attempted murder had he not been incarcerated, the district court cleared up that issue at the third sentencing hearing by explicitly stating that it was not relying on that finding. The district court carefully considered all of the sentencing factors under § 3553(a), including England's conduct and demeanor through the trial and three sentencing hearings. Taking all of these factors together, the district court determined that England's conduct warranted the substantial sentence of 210 months. Our review of the reasonableness of a sentence is necessarily a deferential one. Finding no procedural error and no abuse of discretion, we find that this sentence was reasonable and AFFIRM the district court's decision to sentence England to 210 months.

555 F.3d 616

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
David H. ENGLAND, Defendant-Appellant.
No. 08-2440.

Argued Jan. 21, 2009.
Decided Feb. 13, 2009.

Monica Mallory, Attorney (argued), Office of the United States Attorney, Rockford, IL, Peter M. Jarosz, Attorney, Office of the United States Attorney, Madison, WI, for Plaintiff-Appellee.

Martin J. Bishop, Attorney, Thomas R. Mikrut, Attorney (argued), Foley & Lardner, LLP, Chicago, IL, for Defendant-Appellant.

Before POSNER, FLAUM, and WOOD, Circuit Judges.

FLAUM, Circuit Judge.

A jury convicted defendant-appellant David H. England of one count of illegal possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and three counts of obstruction of justice under 18 U.S.C. §§ 1512(b)(1), 1512(b)(2)(B), and 1512(a)(2). On April 27, 2006, the district court sentenced England to 262 months' imprisonment. England appealed his conviction and sentence to the Seventh Circuit. On November 7, 2007, we affirmed England's conviction, but we vacated his sentence and remanded his case back to the

district court for resentencing. *United States v. England,* 507 F.3d 581 (7th Cir.2007). On June 2, 2008, the district court conducted a new sentencing hearing and sentenced England to 210 months. England now appeals that sentence. For the following reasons, we vacate England's sentence and remand for resentencing.

I. Background

Police arrested England for allegedly breaking a car window with the butt of a gun on September 15, 2004. While in custody, England called his sister, Dawn Bull, and asked her to move the car to his grandmother's house and "put a tarp over it." He also called his brother-in-law, Robert Bull, inquiring as to the whereabouts of the car and telling Bull not to let anyone use it. On September 26, after moving the car, England's sister and mother found a blue duffle bag in the engine compartment. Concerned about the contents of the bag, they flagged down a police officer who removed it and found a bloodied gun inside. Police conducted DNA analysis on the recovered blood and matched the sample to England.

Upon learning of the gun's recovery, England became concerned that his sister and mother were cooperating with police. On September 27, England called his brother-in-law and told him to make sure that his sister and his mother "don't get out o' hand" and told him to "control them women." Later, on November 1, he also asked his sister to corroborate

his alibi, saying that he did not "understand why a . . . couple of my family members can't . . . recognize they were up there at Barnes and Noble that particular day, and they seen me up there." His sister Dawn refused.

On November 23, a federal grand jury indicted England. The indictment charged one count of unlawful possession of a firearm by a felon under 18 U.S.C. § 922(g)(1).

On December 15, England learned that his brother-in-law had been cooperating with the police, which angered England. He could not call his brother-in-law directly as Bull had blocked all calls from the prison, so England called his father, Ben England, instead. He told his father that he would "put some bullets in somebody's head" and asked his father to "talk with [Bull] man to man." On December 27, England went further, asking his father to "go relay a message to Robert" that if he "shows up to court, when I walk outta prison in fifteen years, I'm 'onna fuckin' murder his motherfuckin' ass."

On March 1, 2005, a grand jury issued a superseding indictment, tacking on two counts of witness tampering and one count of threatening a witness. Count II charged England with attempting to persuade a witness to provide a false alibi for him under 18 U.S.C. § 1512(b)(1). Count III charged England with attempting to cause witnesses to conceal evidence under § 1512(b)(2)(B). Count IV charged England with threatening physical force against a witness, his

brother-in-law, Robert Bull, in order to influence his testimony under § 1512(a)(2).

England represented himself at trial, which was held on January 3-6, 2006. With respect to Count IV, at trial England's father testified that he never relayed the threats to Bull. Bull testified that England never directly threatened him, and he did not learn of England's statements until the government alerted him later in the investigation. On January 6, the jury convicted England on all four counts.

At sentencing, the district court requested briefing on the appropriate guidelines section to apply to Count IV, which charged threatening physical force against a witness. The presentence investigation report (PSR) stated that U.S.S.G. § 2A2.1(a)(1) was appropriate. That section covers "Assault with Intent to Commit Murder; Attempted Murder" and has a base offense level of 33. The court, however, directed both parties to brief whether U.S.S.G. § 2J1.2 might be more appropriate. That section covers "Obstruction of Justice" and would result in an offense level of 22.[1] The court stated, "I think 2J1.2(a) probably is [applicable] because this is only a threat. It's not an attempt that could have been charged or that is the alternate in that section."

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[1] The base offense level set out in § 2J1.2(a) is 14, with 8 levels added by § 2J1.2(b)(1)(A) "[i]f the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice."

However, the court ultimately found that § 2A2.1 was appropriate. In so doing, the court first looked to the statutory index in Appendix A and located 18 U.S.C. § 1512(a). The Appendix indicated that § 1512(a) applied to four separate guidelines sections. The court indicated that § 2J1.2 was not one of the four guidelines sections listed in the index. Pursuant to our holding in *United States v. Lanas,* 324 F.3d 894 (7th Cir.2003), the court reasoned that "Assault with Intent to Commit Murder; Attempted Murder" was the most germane of the listed sections, and it stated that it had to "apply the offense guidelines referenced in the statutory index to the statute of conviction unless the case falls within the limited stipulation exception," which was inapplicable. Although the court found it "somewhat difficult in this case," it applied § 2A2.1 and set the base offense level at 33. The advisory guideline range using § 2A2.1 was 210 months to 262 months. At the sentencing hearing, England presented evidence in an effort to persuade the district court that a shorter sentence was warranted. Ben England testified that he did not take his son's threats against Robert Bull seriously because his son was merely angry. He also testified that no one in his family fears his son. Robert Bull, the purported target of the threat, testified that England was merely "blowing off steam," and that he did not feel threatened by England. Nevertheless, the court sentenced England to 262 months, the upper limit of the advisory guideline range for attempted murder.

England appealed his conviction and his sentence. We affirmed England's conviction, but we vacated his sentence and remanded the case to the district court for resentencing.

In evaluating England's sentence, we examined the legislative history for 18 U.S.C. § 1512, and we found that the absence of guideline § 2J1.2 from the statutory index was likely the result of a "fairly pernicious scrivener's error" that occurred when § 1512(a) was substantially amended in 2002 but the guidelines were not updated to reflect those statutory changes. *Id.* at 591-92. While England claimed his sentence was unreasonable, we did not find it necessary to reach the reasonableness of England's sentence. We stated that the record on appeal lacked any indication that the district court considered "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," as required by § 3553(a)(6), and therefore the record was inadequate to evaluate the district court's use of its discretion. *Id.* at 590-92. We continued that a potential disparity might arise where a threat was sentenced at the same level as an attempted murder, and that this disparity could provide a basis for a variance. *Id.* We indicated that the district court should explain its view on the potential disparity as part of its § 3553(a) analysis, and we vacated and remanded for resentencing to give it a chance to do so. *Id.*

Following our decision, the United States Sentencing Commission proposed amendments to the

guidelines to include, among other things, a "technical amendment" adding § 2J1.2 to the statutory index for convictions under § 1512(a). *See* Sentencing Guidelines for United States Courts, 73 Fed.Reg. 4931, 4936 (Jan. 28, 2008). On May 1, 2008, the Sentencing Commission sent the amendments to Congress to become effective on November 1, 2008. *See* Sentencing Guidelines for United States Courts, 73 Fed.Reg. 26924, 26936 (May 9, 2008). The Sentencing Commission commented: "The amendment also adds a reference to § 2J1.2 (Obstruction of Justice) for a violation of 18 U.S.C. § 1512(a) to reflect the broad range of obstructive conduct, including the use of physical force against a witness, covered by the subsection." *Id.*

On June 2, 2008, the district court held the remanded sentencing hearing. Following argument by the parties, the court permitted England to allocute at length. England admitted his crimes of carrying a gun and obstruction of justice, and he acknowledged they were wrong. He also stated that he would not harm anyone once he was released from prison, nor would he carry a gun.

The district court then issued its sentencing decision. The court noted that the advisory guidelines range that it had applied previously was correct, although there might have been a scrivener's error in the guidelines, and that it was bound to apply the same advisory sentencing guidelines range used at the original hearing.

The court then considered the § 3553(a) factors to determine whether England should be sentenced within, above, or below the advisory guidelines range. The court stated it was considering all of the evidence and the arguments from the original sentencing hearing, including the PSR. In addition, the court noted that it would consider the Sentencing Commission's proposed amendment, which added § 2J1.2 to 18 U.S.C. § 1512(a) offenses in Appendix A of the statutory index.

As to the § 3553(a) factors, the court first considered the nature and circumstances of the offenses. The court found that they were aggravated, in that England not only possessed the weapon in Count I, but he also threatened to use it against someone in anger. The circumstances of the offense were further aggravated, according to the district court, by England's obstructive conduct, which took place over a series of telephone calls from prison.

Turning to England's history and characteristics, the court described England as abusive, belligerent, and antisocial. The court accepted the findings of a forensic psychologist who concluded that England has an antisocial personality disorder that is chronic and pervasive. Based on this evidence, the court determined that England would remain confrontational. The court concluded England was "a person who can be dangerous, especially if he's angry," and a person willing to go "beyond mere threats." Additionally, the court noted that England committed the offenses of conviction while on probation, and it stated that he

needed to be deterred from letting his anger get the best of him, for the protection of the public.

The court next addressed the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, pursuant to § 3553(a)(6). It acknowledged that while the advisory range was 210 to 262 months under § 2A2.1, it would be 92 to 115 months if § 2J1.2 had applied. The court stated that it was necessary to start with the correct guidelines and then make appropriate adjustments. It added that the parties had not submitted evidence of records of convicted defendants similarly situated to England, complicating any § (a)(6) analysis. The court continued that the § (a)(6) considerations had to be balanced with all of the other § 3553(a) factors.

After completing its § 3553(a) analysis, the district court made several additional findings in resentencing England. The court found that England was "more in line with a person who might attempt to murder someone." The court continued:

> Now, I say that, that if the defendant had been out on bond right after the state charge, a felon in possession, and he was angry with either his family's testimony or he was angry with those four witnesses, I think he would have gone and done something at least to those four witnesses in order to try to persuade them not to testify against him, and I have no doubt that he would have taken a weapon, and that would have been a

> substantial step that's necessary for an attempt offense of murder. I think he would have gone to what degree of force that was necessary to get them to drop the charges against him. Threats, shooting, whatever. And, therefore, in this respect he is more like the attempted murderer than someone who's just one who's obstructing justice.

The sentencing court further found that England's statements that "he takes actions on his own" made him "one who more closely fits the type of person who would commit a murder," even though the court acknowledged that England always qualified these statements by saying he takes actions with words and not "by force." The court concluded "[t]herefore, the court in looking at these [§ 3553(a)] factors, I've considered (a)(6) and find that he is closer to the attempted murder[er] than he is to the obstructive type of person. . . ." The court determined that a sentence within the advisory guidelines range of 210 to 262 months was reasonable and just. The court also found that even if the lower guidelines range under § 2J1.2 were applicable, the court would be inclined to vary England's sentence upward. Accordingly, the court sentenced England to a total sentence of imprisonment of 210 months, the low end of the advisory guidelines range under § 2A2.1.

II. Analysis

England now appeals the 210-month sentence that the district court imposed on him at the June 2,

2008 resentencing hearing. He argues that the district court abused its discretion when it did not find an unwarranted disparity, based on § 3553(a)(6), resulting from imposing a sentence within the guideline range for attempted murder. He also claims that the district court's reasoning supporting the sentence – especially its finding that England "is closer to the attempted murder[er] than he is to the obstructive type of person" – was "grounded on pure conjecture" and was improper.

On remand, after hearing arguments from the parties and permitting the defendant to allocute, the district court considered the § 3553(a) factors, including § (a)(6), in detail. The district court's thorough analysis of the § 3553(a) factors was more than adequate. We agree with the court's statement that it could not conduct a full § (a)(6) analysis because the parties had not submitted evidence of defendants with similar records who had been found guilty of similar conduct. The court detailed unique aspects of England's character and criminal history to support a relatively harsh sentence. Despite England's contentions, the district court's § 3553(a) analysis was proper and did not constitute an abuse of discretion.

After the district court carefully considered the § 3553(a) factors, however, it stated that it would make its "findings." In doing so, the court engaged in an additional analysis concerning whether England – although convicted only for felon in possession and obstruction of justice crimes – should be sentenced "like the attempted murderer." The court envisioned

what would have happened if England was not in prison for the felon in possession charge but rather was out on bond. The court understandably presumed that, at the time he was released, England would have felt angry with his family members or other witnesses because of their testimony. Then the court stated that, in such a scenario, it "think[s] he would have gone and done something." The court opined that this "something" would have consisted of England taking a weapon and seeking out his family members or other witnesses, which would have been a "substantial step that's necessary for an attempt offense of murder." The court repeatedly expressed its belief that England is "like the attempted murderer" and should be sentenced as such.

We grant sentencing courts discretion to draw conclusions about the testimony given and evidence introduced at sentencing. *United States v. Hankton,* 432 F.3d 779, 786 n. 14 (7th Cir.2005) (citing *United States v. Sutton,* 406 F.3d 472, 474 (7th Cir.2005)). Yet, this discretion is neither boundless nor is the information upon which a sentencing court may rely beyond due process limitations. To the contrary, we recognize that due process requires that sentencing determinations be based on reliable evidence, not speculation or unfounded allegations. *United States v. Santiago,* 495 F.3d 820, 824 (7th Cir.2007); *United States v. Noble,* 246 F.3d 946, 951 (7th Cir.2001); *see also United States v. Berry,* 553 F.3d 273, 284 (3d Cir.2009) ("A defendant cannot be deprived of liberty based upon mere speculation."). Indeed, the Supreme

Court has long recognized that "[n]o individual or body of men has a discretionary or arbitrary power to commit any person to prison." *Hurtado v. California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). If the district court relied on unreliable or inaccurate information in making its sentencing decision, we return the case to the district court for a new sentencing hearing. *See United States v. Jones,* 454 F.3d 642, 652 (7th Cir.2006); *United States ex rel. Welch v. Lane,* 738 F.2d 863, 865 (7th Cir.1984).

In this case, there is no doubt that the district court relied on its findings that England is akin to an attempted murderer in imposing its 210-month sentence. The court explicitly stated that "a just sentence is within the guideline range of 210 to 262 months" because of "the reasons that I've just stated," namely the comparisons of England to an attempted murderer.

The key inquiry posed by this appeal is if these findings by the district court were sufficiently "based on reliable evidence" to satisfy due process, or if they amount to speculation, albeit informed, that falls short of satisfying due process requirements. *See Santiago,* 495 F.3d at 824; *Noble,* 246 F.3d at 951. Evidence will satisfy the reliability requirement if it "bear[s] sufficient indicia of reliability to support [its] probable accuracy." *United States v. Cross,* 430 F.3d 406, 410 (7th Cir.2005) (quoting *United States v. Lanterman,* 76 F.3d 158, 161 (7th Cir.1996)). As a general matter, to satisfy this requirement, facts considered at sentencing must be proved by a

preponderance of the evidence. *United States v. Watts,* 519 U.S. 148, 156, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) ("facts relevant to sentencing [should] be proved by a preponderance of the evidence [ ] and . . . application of the preponderance standard at sentencing generally satisfies due process."); *United States v. Schuster,* 948 F.2d 313, 315 (7th Cir.1991) (stating that due process does not require that the facts on which a sentence is based be correct beyond a reasonable doubt but only by a preponderance of the evidence). The preponderance of the evidence standard satisfies due process in a case, such as this one, where the district court sentences a defendant based on the guideline for a crime the court believes the defendant would have committed if out of prison on bond. Simply put, the question here is whether a preponderance of the evidence supports the court's *belief* that the defendant *would have* committed the crime. Adhering to such a standard operates to preclude a sentencing court from sentencing defendants for crimes not sufficiently supported by reliable evidence.

Turning to this case, we are unable to conclude that a preponderance of the evidence buttresses the court's belief that England would have attempted murder. We find an insufficient quantum of evidence to support the court's assumption that England, if out on bond, would have (a) possessed the criminal intent to kill, and (b) performed an act constituting a substantial step toward the commission of murder, as required to prove the crime of attempted murder in Illinois. *See People v. Brown,* 341 Ill.App.3d 774, 275

Ill.Dec. 595, 793 N.E.2d 75, 80 (2003). While recognizing that the district court cited England's criminal history and personal characteristics as evidence that he would act on his threats, it appears as likely that a factfinder could conclude that England, if out on bond, would not so act. England's family members, including his brother-in-law Robert Bull, testified that they did not feel threatened by England's statements. Bull and other family members believed that England was merely "blowing off steam" in issuing threats. Hence, because the evidence appears at least in equipoise, the preponderance standard is not met.

The court's statement that, even if the lower guidelines range under § 2J1.2 were applicable, the court would be inclined to vary England's sentence upward does not alleviate the need to meet the preponderance standard. The court was still referring to its finding that England should be sentenced like an attempted murderer. In any event, the court did not specify how far upward it would depart. Therefore, we respectfully – and with a degree of reluctance considering the district court's diligence in attempting to arrive at the correct disposition in this matter – vacate England's sentence and remand to the district court for resentencing.

In arriving at our decision, we want to underscore that we do not pass judgment on the reasonableness of the 210-month sentence imposed by the district court. As noted above, the able and experienced district court judge conducted a thorough and meaningful § 3553(a) analysis and the sentence that

he imposed very well may be reasonable. The district court need not repeat this analysis at resentencing; it can adopt the § 3553(a) findings arrived at during the June 2, 2008 hearing. We only require that the district court make its sentencing determination without reliance on a finding that England would have attempted murder if out on bond unless further evidence is adduced which would justify such a conclusion.

III. Conclusion

We VACATE England's sentence and REMAND for resentencing.

507 F.3d 581

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
David H. ENGLAND, Defendant-Appellant.
No. 06-2381.

Argued Sept. 24, 2007.
Decided Nov. 7, 2007.

Monica Mallory (argued), Office of the United States Attorney, Rockford, IL, for Plaintiff-Appellee.

Thomas L. Shriner, Jr., Foley & Lardner, Milwaukee, WI, Ellen M. Wheeler, Joanne Lee (argued), Foley & Lardner, Chicago, IL, for Defendant-Appellant.

Before POSNER, FLAUM and WOOD, Circuit Judges.

FLAUM, Circuit Judge.

On September 15, 2004, defendant-appellant David England, a convicted felon, smashed his neighbor's car window with the butt of a gun and then discharged the gun into the air. England was soon arrested and, while in prison, he campaigned over the prison phone to get his sister, brother-in-law and father to hide evidence and create an alibi for him. When he learned that his brother-in-law was instead cooperating in the investigation, he made threats to kill him.

For his efforts, a grand jury returned a four-count indictment. The indictment charged one count

of unlawful possession of a firearm by a felon under 18 U.S.C. § 922(g), two counts of witness tampering in violation of 18 U.S.C. § 1512(b), and one count of threatening physical force with the intent to prevent the testimony of a witness in violation of 18 U.S.C. § 1512(a)(2)(A). At trial, England proceeded without counsel and, on January 6, 2006, a jury convicted him of all counts. The district court then sentenced England to 262 months imprisonment.

England now appeals, challenging the sufficiency of the evidence underlying his conviction for the threats, the voluntariness of his decision to represent himself, and the reasonableness of his sentence. For the reasons set out below, we affirm his conviction and the district court's finding of a voluntary waiver of his right to counsel. However, because the district court did not consider the potential disparity that may arise from England's sentence, we vacate his sentence and remand for resentencing.

I. Background

On September 15, 2004, defendant-appellant David England was investigating a recently broken window in his mother's home. He had confronted four neighbors about the incident and tried to get one to admit to breaking the window. When his efforts to elicit a confession failed, he evened the score by shattering two car windows in a nearby car and firing a gun into the air. One of the onlookers notified the police and, a week later, the police apprehended

England at a gas station where he had stopped to refuel. The police opted not to impound the car he was driving – his mother's Pontiac Grand Am – and it remained parked at the gas station. Based on the onlookers' statements, a grand jury indicted England for being a felon in possession of a firearm.

While in custody, England called his sister, Dawn Bull, regarding the Grand Am. He asked his sister to move the car to his grandmother's house and "put a tarp over it." Later that day and again on September 25, he called his brother-in-law, Robert Bull, inquiring as to the whereabouts of the car and telling Bull not to let anyone use it. On September 26, after moving the car, England's sister and mother found a blue duffle bag in the engine compartment. Concerned about the contents of the bag, they flagged down a police officer who removed it and found a bloodied gun inside. The police conducted DNA analysis on the recovered blood and matched the sample to England.

News of the gun's recovery did not sit well with England; he immediately grew concerned that his sister and mother were cooperating with the police. On September 27, he called his brother-in-law and told him to make sure that his sister and his mother "don't get out o' hand" and told him to "control them women." Later, on November 1, he also asked his sister to corroborate his alibi, saying that he did not "understand why a . . . couple of my family members can't . . . recognize they were up there at Barnes and

Noble that particular day, and they seen me up there." Dawn refused.

On December 15, England learned that his brother-in-law had been cooperating with the police and he boiled over. He could not call his brother-in-law directly as Bull had blocked all calls coming from the prison. So England called his father instead. He told his father that he would "put some bullets in somebody's head" and asked his father to "talk with [Bull] man to man." On December 27, he went further, asking his father to "go relay a message to Robert" that if he "shows up to court, when I walk outta prison in fifteen years, I'm 'onna fuckin' murder his motherfuckin' ass." At trial, England's father would testify that he never relayed these threats to Bull. In fact, Bull would not learn of England's statements until the government alerted him later in the investigation. Nonetheless, based on these threats and England's efforts to procure an alibi, on March 1, 2005, a grand jury issued a superseding indictment, tacking on two counts of witness tampering and one count of threatening a witness.

During his initial appearance for the felon-in-possession charge, the court appointed England an attorney, Paul Flynn. During England's continued detention hearing on February 8, Flynn advised the magistrate judge that England wanted to represent himself, despite Flynn's advice to the contrary. Near the end of the hearing, the magistrate questioned England extensively on his decision to represent himself. During the colloquy, England stated that he had

studied the law off and on for several years and had helped with his prior criminal trials. He said that he was familiar with the Federal Rules of Evidence and Criminal Procedure and knew that the judge would not assist him during the trial. Finally, England said that he understood the evidence that the government would offer and, despite the magistrate's opinion that he would be better served by a lawyer, he wanted to represent himself. When Flynn expressed his concern that England only wanted to represent himself to move to a separate prison, the magistrate inquired further and clarified that self-representation would not impact his location. Satisfied by England's responses and convinced that the waiver was voluntary, the magistrate permitted England to proceed pro se with Flynn as standby counsel.

The next week, on February 14, the district court held another pre-trial proceeding to determine whether England had knowingly and voluntarily waived his right to counsel. The court expanded upon the magistrate's questioning, including an inquiry into England's personal history; his education and family background; various aspects of the trial such as the marshaling of evidence and the function of opening statements; and England's familiarity with the charges and potential sentencing issues that could arise. The district court also concluded that England would be better off with an attorney and so informed England. Following the questioning, England remained convinced that he wanted to represent himself. The extensive questioning satisfied

the court that England's waiver was voluntary, and the court allowed him to proceed pro se. After England claimed that he was having problems with Flynn, the court appointed new full-time counsel, Dennis Ryan. On December 29, 2005, England again requested to represent himself and, after determining that this was done knowingly and voluntarily, the court complied, appointing Ryan as standby counsel. The case went to trial on January 3, 2006. On January 6, the jury convicted England on all counts.

At sentencing, the court requested briefing on the appropriate Guidelines section to apply to Count IV-threatening physical force with the intent to prevent the testimony of a witness. The government and the presentence investigation report initially stated that U.S.S.G. § 2A2.1(a)(1) was appropriate. This section covers "Assault with Intent to Commit Murder; Attempted Murder" and has a base offense level of 33. The court, however, directed both parties to brief whether U.S.S.G. § 2J1.2 might be more appropriate. This section covers "Obstruction of Justice" and would result in an offense level of 22.[1] The court ultimately ruled that § 2A2.1 was appropriate. In so doing, the court first looked to the statutory index in Appendix A and located 18 U.S.C. § 1512(a). The Appendix indicated that § 1512(a) applied to four

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[1] The base offense level set out in 2J1.2(a) is 14, with 8 levels added by 2J1.2(b)(1)(A) "[i]f the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice."

separate Guidelines sections. The court reasoned that "Assault with Intent to Commit Murder; Attempted Murder" was the most germane and stated that it had to "apply the offense guidelines referenced in the statutory index to the statute of conviction unless the case falls within the limited stipulation exception," which was inapplicable. Although the court found it "somewhat difficult in this case," it applied § 2A2.1 and set the base offense level at 33. The court declined to lower the sentence under 18 U.S.C. § 3553(a) and sentenced England to 262 months. This appeal followed.

II. Discussion

A. Waiver of Right to Counsel

England argues that he did not knowingly and voluntarily waive his right to counsel. The right to represent oneself is "necessarily implied by the structure" of the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Although one can certainly question the wisdom of self-representation, the right has a worthy pedigree; a defendant's freedom to raise his own voice in his defense comes from the notion that some measure of individual autonomy prevents a court from forcing an attorney upon the defendant. *Id.* However lofty this ideal may be, courts cannot rubber-stamp a defendant's invocation of his right to self-representation. The district court must make the defendant "aware of the dangers and disadvantages

of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id.* at 835, 95 S.Ct. 2525 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)).

To that end, this Court has established a four-part test that examines: (1) whether and to what extent the district court conducted a formal hearing into the defendant's decision to represent himself; (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant's decision to waive his right to counsel. *United States v. Todd,* 424 F.3d 525, 530 (7th Cir.2005). This Court reviews the district court's finding of voluntary waiver for an abuse of discretion, *Todd,* 424 F.3d at 530 n. 1, and we will not overturn the district court's decision "unless it would result in fundamental unfairness impinging on due process rights," *United States v. Irorere,* 228 F.3d 816, 827 (7th Cir.2000) (quoting *Maclin v. Freake,* 650 F.2d 885, 886 (7th Cir.1981)). Based on our review of the questions posed by the magistrate and district court, we agree that England's waiver was knowing and voluntary.

As to the first factor, both the magistrate and the district court adequately informed England of exactly what he was waiving. A court does not have to give the defendant a crash course in criminal law or trial procedure before a defendant's waiver of his right to

counsel will be voluntary. *See Todd,* 424 F.3d at 531. However, the "failure to inform [a defendant] of the dangers and disadvantages of self-representation weighs against a finding of a knowing or intelligent waiver." *United States v. Bell,* 901 F.2d 574, 578 (7th Cir.1990). On two occasions during the pretrial proceedings – before the magistrate and again before the district court – England received warnings about the pitfalls of self-representation. The magistrate's questioning tracked most, if not all, of the questions contained in the Federal Judicial Center's Benchbook for U.S. District Court Judges. The magistrate specifically probed England's familiarity with the Federal Rules of Evidence and Criminal Procedure, the nature of the charges against him, and the law more generally. In addition, the magistrate informed him that he would be better served by professional counsel and retained Flynn as standby counsel. Although strict adherence to the Benchbook is not required and rote adherence not desired, *United States v. Egwaoje,* 335 F.3d 579, 585 (7th Cir.2003), the magistrate's questioning meaningfully touched upon all the pitfalls of self-representation set out in the Benchbook. Six days later, the district court questioned England again and went even further, discussing matters ranging from the purpose of the opening statement to his reasons for forgoing representation, possible strategies for cross-examination, and the government's burden of proof. The district court's initial investigation – spanning thirty-three pages of transcript – provides an impressive illustration of a formal inquiry into a

defendant's waiver of his right to counsel. These two wide-ranging discussions of the effects of waiver nearly a year before trial were clearly sufficient to inform England of the consequences of his decision.

Turning to the second factor, other evidence indicates that England understood the consequences of his waiver. In analyzing this factor, this Court has credited statements by the defendant regarding his own legal disability and explanations by standby counsel of the pitfalls of self-representation. *United States v. Sandles,* 23 F.3d 1121, 1128 (7th Cir.1994). At the initial hearing before the magistrate, England's then-attorney said that he had tried to talk England out of his decision, but England would not listen. *See United States v. Moya-Gomez,* 860 F.2d 706, 735-36 (7th Cir.1988) (crediting statements by standby counsel in finding voluntary waiver). Before the district court, England recognized his own legal inability and said that he would do "about the same [as an attorney], or I guess I'll have to take my chances." *See Moya-Gomez,* 860 F.2d at 735 (crediting awareness of legal disability in finding waiver). In addition, after his own advocacy failed to gain an acquittal, England handed the reins over to his standby counsel during sentencing, saying that he did not know what he was doing. That England recognized the risk of self-representation, after being informed that he had made an unwise decision by his acting attorney, provides other evidence that England was aware of the consequences of waiver.

As to the third factor, England's background and experience would also tend to support a finding of knowing and voluntary waiver. This Court examines the background and experience of the defendant merely to gauge whether he appreciated the gravity of his waiver, not in the hopes of finding adequate legal training. *See Faretta,* 422 U.S. at 835, 95 S.Ct. 2525 (stating that "a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation"); *Egwaoje,* 335 F.3d at 585-86. England's background indicated that he proceeded with his eyes open. He had the equivalent of a high school education and had thirty-six credits at a community college. A doctor determined that he was competent to stand trial and did not have any mental health issues that would interfere with his ability to understand waiver. England also had been in court several times before for his state criminal charges. Granted this was England's first time in federal court and he had not represented himself in his earlier proceedings. However, his prior involvement with the criminal justice system apprised him of the "seriousness of the charges brought against him." *Egwaoje,* 335 F.3d at 586.

Finally, the context of England's decision indicates that it was knowing and voluntary. A waiver is likely knowing and voluntary if the defendant gave it for strategic reasons or after repeatedly rejecting the assistance of counsel. *Egwaoje,* 335 F.3d at 586. England's behavior at trial caused unnecessary delay

and duplicated the proceedings. On February 8 and 14, 2005, England said that he wanted to represent himself and the court appointed Flynn as stand-by counsel. In June, he complained of medical problems but refused to cooperate with the doctors. On July 1, 2005, the government moved to replace Flynn as stand-by counsel after England accused Flynn of working for the prosecution. When the court subsequently appointed Ryan as stand-by counsel, little improved. England refused to cooperate or even meet with Ryan. At one point, England even spat in Ryan's face. England's behavior at trial seemed calculated to delay and complicate the proceedings whenever possible. Self-representation gave him the opportunity to do this. In light of his behavior at trial, his decision to forgo counsel was rooted in strategy and, accordingly, this factor favors a finding of voluntary waiver.

For the foregoing reasons, England's waiver of his right to counsel was knowing and voluntary. Each factor supports a finding of voluntariness; the evidence of voluntariness is overwhelming. Accordingly, we affirm the district court's finding of waiver.

B. Sufficiency of the Evidence

England also argues that the evidence was insufficient to support his conviction for witness tampering under 18 U.S.C. § 1512(a)(2)(A). A challenge based on the insufficiency of the evidence is a tall order, *United States v. Johnson*, 903 F.2d 1084, 1086 (7th Cir.1990),

and the standard governing such challenges is familiar: This Court must affirm a conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citing *United States v. Troop,* 890 F.2d 1393, 1397 (7th Cir.1989)) (emphasis omitted). In other words, an appeal does not deputize this Court as the ultimate trier of fact. Section 1512(a)(2)(A) punishes whoever "uses physical force or the threat of physical force against any person . . . with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding." 18 U.S.C. § 1512(a)(2)(A). To sustain a conviction under § 1512(a)(2)(A), the government must show that (1) England used the threat of physical force; (2) with the intent of curtailing his brother-in-law's involvement in his prosecution. On appeal, the issue before this Court is a narrow one. England rightly does not deny expressing a desire to kill his brother-in-law for cooperating; the recorded conversations with his father over the prison phone prove as much. Instead, England argues that his statements to his father cannot support the weight of his conviction because his father never relayed the threats to his brother-in-law. A threatening statement that the intended recipient does not receive, England argues, is not the "use of . . . [a] threat" for purposes of § 1512(a)(2)(A). We disagree.

The statute itself does not define what it means to "use [ ] . . . the threat of physical force." However, the plain meaning of the phrase does not require that

the would-be victim learn of the threat. The verb "use" in § 1512(a)(2) is roughly akin to "employ" and means to "to put into action or service." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2523 (1981); *see also* BLACK'S LAW DICTIONARY 1541 (6th ed.1990) (defining "use" as "to convert to one's services"). And a "threat" is "an expression of intention to inflict evil, injury, or damage on another." WEBSTER'S THIRD, *supra,* at 2382; BLACK'S, *supra,* at 1480 (defining "threat" as a "communicated intent to inflict physical or other harm on any person or on property"). When read together, the statute prohibits expressing an intent to inflict injury on another through physical force.[2] An "expression" only requires that *someone* – not necessarily the intended victim – perceive it. Adding a requirement that the would-be victim himself actually perceive the threat would graft on an additional "receipt" element that the statute's text does not require. *See United States v. Geisler,* 143 F.3d 1070, 1071-72 (7th Cir.1998) (rejecting a "receipt" requirement under 18 U.S.C. § 876, which prohibits depositing threatening communications in the mail); *see also Johnson,* 903 F.2d at 1088 n. 5 (stating that under § 1512 "the focus is on the endeavor to bring about the proscribed result, rather than on the success of the endeavor").

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[2] "Putting an expression into action or service" means simply "expressing." *See* WEBSTER'S THIRD, *supra,* at 802 (defining "express" as "to represent in words" and "expression" as "an act, process, or instance of representing, manifesting or conveying in words or some other medium").

We have not read an analogous requirement into other statutes prohibiting threats. *See United States v. Fuller,* 387 F.3d 643, 646-47 (7th Cir.2004) (18 U.S.C. § 871); *Geisler,* 143 F.3d at 1071-71 (18 U.S.C. § 876). Accordingly, we decline to do so under § 1512(a)(2)(A).

To avoid this result, England argues that, because the threat never actually made it to his brother-in-law, his statements did not have a "reasonable tendency to intimidate," citing the standard articulated by this Court in *United States v. De Stefano,* 476 F.2d 324 (7th Cir.1973). However, this argument misreads *De Stefano.* The relevant issue in that case was whether a none too subtle "question" that the defendant posed to a witness in an elevator – "Have you done any fishing lately?" – constituted a threat under 18 U.S.C. § 1503. *Id.* at 327, 330. The Court articulated an objective standard for evaluating whether a statement constitutes a threat, concluding that the relevant inquiry is whether the statement has a "reasonable tendency to intimidate." *Id.* at 330. This standard governs the contents of the threat; that is, whether the defendant's statement is actually "an expression of intention to inflict evil, injury, or damage." This objective reasonableness standard ensures that only "true threats" go punished. *See Watts v. United States,* 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *United States v. Stewart,* 411 F.3d 825, 828 (7th Cir.2005) (stating that a "true threat" consists of a statement made "in a context or under such circumstances

wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as" a threat (quoting *United States v. Khorrami,* 895 F.2d 1186, 1191 (7th Cir.1990))). It does not provide a yardstick for measuring the likelihood that the statement would either reach or subjectively affect the intended recipient.

Nonetheless, the fact that the intended target never received the threat is still relevant under § 1512(a)(2)(A). The proximity of the person who hears the threat to the ultimate target of the threat is evidence of the speaker's "intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding." *Cf. United States v. Spring,* 305 F.3d 276, 281 (4th Cir.2002) (stating that "whether a threat was communicated to the victim may affect whether the threat could reasonably be perceived as an expression of genuine intent to inflict injury"). As the link between an expression of an intent to inflict injury and the participant in an official proceeding grows more attenuated, so too does the inference that the speaker intended to "influence, delay, or prevent" testimony in an official proceeding. In this case, no such attenuation exists. England could not reach his brother-in-law because he had blocked calls from the prison phone. His next best option was to convey the threats to his father with instructions to pass them along. Although it was not inevitable that his father would relay the threat, it was not irrational to think that England intended to influence his brother-in-law.

Because rationality is the relevant inquiry, sufficient evidence supported England's conviction under § 1512(a)(2)(A).

C. Reasonableness of England's Sentence

Finally, England challenges the reasonableness of his sentence. In calculating England's sentence, the district court first looked to the statutory index of the Guidelines and found the Guidelines sections corresponding to 18 U.S.C. § 1512(a). Pursuant to this Court's holding in *United States v. Lanas,* 324 F.3d 894 (7th Cir.2003), the district court concluded that the most germane Guidelines section was U.S.S.G. § 2A2.1, which punishes "Assault with Intent to Commit Murder; Attempted Murder." In so doing, the court rejected England's argument that it should apply U.S.S.G. § 2J1.2, which governs "Obstruction of Justice," but which the Guidelines do not link to § 1512(a). After grouping the four counts, the district court calculated England's sentencing range using the base offense level for attempted murder, carrying an offense level of 33. Finally, the court declined to vary the sentence based on the factors listed in 18 U.S.C. § 3553(a).

The issue on appeal is straightforward: England threatened to kill his brother-in-law yet the Sentencing Guidelines point to a sentence for attempted murder. The difference between the two is not negligible; attempted murder carries a base offense level of 33 whereas threats of physical injury to

obstruct justice carry a base offense level of 22. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2A2.1, 2J1.2 (2005). England's ultimate sentence was 262 months in prison, which, on appeal, England claims is an unreasonable one. However, we do not find it necessary to reach the reasonableness of England's sentence. The record on appeal lacks any indication that the district court considered "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Because the record is inadequate to evaluate the district court's use of its discretion, we vacate England's sentence and remand for resentencing.

As a preliminary matter, the district court properly declined to apply U.S.S.G. § 2J1.2. Prior to the 2000 Amendments to the Sentencing Guidelines, the district court would have been free to choose a section not listed in the statutory index in arriving at the appropriate base offense level, "provided the charged conduct fit more closely within the other guideline." *Lanas,* 324 F.3d at 904. However, the 2000 Amendments deleted this "heartland" provision. Rather than tinker with the Guidelines sections listed in the statutory index, the district court must typically begin with "the offense guideline referenced in the Statutory Index for the statute of conviction." *See United States v. Gracia,* 272 F.3d 866, 876 (7th Cir.2001) (quoting U.S. SENTENCING GUIDELINES MANUAL app. C. supp., amend. 591, at 32 (2000)); *see also United States v. Kosmel,* 272 F.3d 501, 507

(7th Cir.2001) (discussing effect of Amendment 591 on "heartland" analysis). As long as the ultimate sentence is reasonable, the district court can vary from the sentence identified in the Guidelines based on its discretion under § 3553(a). *See United States v. Vitrano*, 495 F.3d 387, 391-92 (7th Cir.2007).

In denying the defendant's request for a variance, the district court did not actively consider 18 U.S.C. § 3553(a)(6) and the sentence disparity that may arise from England's sentence. In a post-*Booker* world, the district court enjoys considerable discretion when imposing a sentence. The present sentencing regime consists of a nearly exhaustive set of rules set out in the Guidelines that is moderated by judicial discretion and the reasonableness standard. Illustrative of this discretion are the considerations set out in 18 U.S.C. § 3553(a); the result dictated by the rigid calculus in the Guidelines must first pass through the discretion conferred by these factors before a sentence becomes final. *See United States v. Cunningham*, 429 F.3d 673, 676 (2005).

In the case at hand, the court gave no indication that it considered the disparity that may arise from England's sentence when it discussed a variance under § 3553(a) even though the defendant pointed to the factual dissimilarity between his threat and the applicable Guidelines section. Elsewhere, the court expressed its concern over the potential injustice that might occur. The district court stated that it found the use of the Guidelines section for attempted murder "somewhat difficult in this case." In addition,

the court requested briefing on whether to apply § 2A2.1 or § 2J1.2 to England's conduct. Despite these concerns and the fact that the typical threat called for a markedly different sentence, the district court did not discuss the potential disparity as part of its § 3553(a) analysis.

This discretion is all the more important where, as here, it appears that the Sentencing Guidelines might have a fairly pernicious scrivener's error. The error results from a recent amendment that Congress made to the witness tampering statute. In 2002, Congress amended 18 U.S.C. § 1512 and created the current § 1512(a)(2). Before the 2002 changes, § 1512(a) only punished "[w]hoever kill[ed] or attempt[ed] to kill another person, with intent to" affect his cooperation in an official proceeding. 18 U.S.C. § 1512(a) (2000). At the time, the Sentencing Guidelines statutory index mapped these offenses to four sections of the Guidelines: first- and second-degree murder, voluntary manslaughter, and § 2A1.1, which governs "Assault with Intent to Commit Murder; Attempted Murder." U.S. SENTENCING GUIDELINES MANUAL app. A, at 459 (2001). Given what § 1512(a) punished at the time, this made sense. A person either "kill[ed]" the person involved in an official proceeding (through first- or second-degree murder or voluntary manslaughter) or "attempt[ed] to kill" him. The statutory index punished accordingly.

Similarly, before the 2002 changes, § 1512(b) punished "[w]hoever knowingly use[d] intimidation or

physical force, threaten[ed], or corruptly persuade[d] another person, . . . or engage[d] in misleading conduct toward another person" involved in an official proceeding. 18 U.S.C. § 1512(b) (2000). The statutory index mapped these offenses to three Guidelines sections: attempted murder, aggravated assault, and § 2J1.2, which governs "Obstruction of Justice." U.S. SENTENCING GUIDELINES MANUAL app. A, at 459 (2001). This also made sense. A defendant either used physical force meaning to kill the witness but fell short (committing attempted murder); used physical force meaning only to harm the witness and succeeded (committing aggravated assault); or threatened, intimidated or otherwise "corruptly persuaded" the witness (and obstructing justice).

In 2002, Congress rearranged the witness tampering statute and added a new § 1512(a)(2). Pub.L. No. 107-273, at 1803-04 (2002). The bill was entitled "Increasing the Penalty for Using Physical Force to Tamper with Witnesses, Victims, or Informants" and it produced the current § 1512. *Id.* Section 1512(a)(2) now punishes "[w]hoever uses physical force or the threat of physical force against any person, or attempts to do so." 18 U.S.C. § 1512(a)(2) (2006). The 2002 amendment also added a ten-year statutory maximum for threats under the modified § 1512(a)(2) and struck "physical force" from § 1512(b). Pub.L. No. 107-273, at 1804. Section 1512(b) now only punishes intimidation, threats, corrupt persuasion and misleading conduct. 18 U.S.C. § 1512(b) (2006).

However, the relevant portions of the statutory index to the Sentencing Guidelines remained exactly the same. *See* U.S. SENTENCING GUIDELINES MANUAL app. A, at 525 (2005). As a result, the Guidelines sections that correspond to § 1512(a) do not include "Obstruction of Justice," even though a threat of physical force against a witness would appear to fall within this category. Similarly, although no crime involving physical violence exists in § 1512(b), the statutory index continues to reference second-degree murder and aggravated assault. Most notably, the statutory maximum for threats under § 1512(a) is ten years, but the *minimum* Guidelines sentence for murder threats under § 1512(a) is over eleven years. *Compare* U.S. SENTENCING GUIDELINES MANUAL ch. 5, part A (2005) (setting minimum sentence for defendant with no prior criminal history and base offense level of 33 at 135-168 months in prison) *with* 18 U.S.C. § 1512(a)(3)(C) (2006) (providing as punishment "in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years").

All of this points to a potential scrivener's error in the statutory index. If a mistake exists, remedying it falls within the purview of the Sentencing Commission, not this Court. However, given the discretion that the district court has in imposing a sentence, the potential disparity that may arise from sentencing a threat as though it was an attempted murder would be a basis for a variance. Because the

district court did not explain its view on the potential disparity, we vacate England's sentence and remand for resentencing. However, we express no opinion as to the appropriate sentence.

III. Conclusion

For the reason's stated herein, we AFFIRM England's conviction and VACATE his sentence and REMAND for resentencing.

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

David H. England

SECOND AMENDED JUDGMENT IN A CRIMINAL CASE

(Filed Jun. 8, 2009)

Case Number: 04 CR 50068

USM Number: 12630-424

Thomas Mikrut
Defendant's Attorney

Date of Original Judgment: 06/02/2008

(Or Date of Last Amended Judgment)

Reason for Amendment:

X Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(h))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2, 3, & 4 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 922(g)(1)	Possession of a Weapon by a Felon	09/22/2004	1s
18 USC § 1512(b)(1)	Tampering with a Witness	11/01/2004	2s
18 USC § 1512(b)(2)(B)	Tampering with a Witness	11/01/2004	3s
18 USC § 1512(a)(2)	Tampering with a Witness	01/19/2005	4s

The defendant is sentenced as provided in pages 2 through 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of

1984. Other than the amendments or modifications stated in this judgement, the judgment previously entered shall stand. (See attachments)

☐ The defendant has been found not guilty on count(s) ___

X Count(s) 1 of the original indictment X is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

06/04/2009
Date of Imposition of Judgment

/s/ Philip G. Reinhard
Signature of Judge

PHILIP G. REINHARD,
U.S. DISTRICT JUDGE
Name and Title of Judge

June 8, 2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term 210 Months

[120 Months on Count 1; 90 Months on Count 2 to run consecutive to Count 1; 120 Months on Count 3 to run concurrent to Counts 1 & 2; 120 Months on Count 4 to run concurrent to Counts 1, 2, & 3]

X * The court makes the following recommendations to the Bureau of Prisons:

1. Defendant should receive mental health evaluation and treatment.
2. Defendant should participate in a comprehensive drug program.
3. Defendant should be designated to Oxford, WI to be closer to his family.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

David H. England

AMENDED JUDGMENT IN A CRIMINAL CASE

(Filed Jun. 3, 2008)

Case Number: 04 CR 50068

USM Number: 12630-424

Date of Original Judgment: 04/27/2006

(Or Date of Last Amended Judgment)

* Joanne Lee and Thomas Mikrut

Defendant's Attorney

Reason for Amendment:

X Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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X was found guilty on counts(s) 1, 2, 3, & 4 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 922(g)(1)	Possession of a Weapon by a Felon	09/22/2004	1s
18 USC § 1512(b)(1)	Tampering with a Witness	11/01/2004	2s
18 USC § 1512(b)(2)(B)	Tampering with a Witness	11/01/2004	3s
18 USC § 1512(a)(2)	Tampering with a Witness	01/19/2005	4s

The defendant is sentenced as provided in pages 2 through 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of

1984. Other than the amendments or modifications stated in this judgement, the judgment previously entered shall stand. (See attachments)

☐ The defendant has been found not guilty on count(s)___

X Count(s) 1 of the original indictment X is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

06/02/2008
Date of Imposition of Judgment

/s/ Philip G. Reinhard
Signature of Judge

PHILIP G. REINHARD,
U.S. DISTRICT JUDGE
Name and Title of Judge

June 3, 2008
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term *210 Months

*[120 Months on Count 1; 90 Months on Count 2 to run consecutive to Count 1; 120 Months on Count 3 to run concurrent to Counts 1 & 2; 120 Months on Count 4 to run concurrent to Counts 1, 2, & 3]

X The court makes the following recommendations to the Bureau of Prisons:

1. Defendant should receive mental health evaluation and treatment consistent with the evaluations already taken at the state and federal levels. 2. Because of defendant's behavior during the *trial proceedings in this case, his security level should be closely evaluated. 3. Defendant should participate in a comprehensive drug program. *4. Defendant should be designated to a facility near Rockford, IL, preferable Oxford, WI, to be closer to family to aid in his rehabilitation and mental health treatment.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: 04 CR 50068-1
David H. England	USM Number: 12630-424
	Dennis J. Ryan Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2, 3, & 4 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 922(g)(1)	Possession of a Weapon by a Felon	09/22/2004	1s
18 USC § 1512(b)(1)	Tampering with a Witness	11/01/2004	2s
18 USC § 1512(b)(2)(B)	Tampering with a Witness	11/01/2004	3s
18 USC § 1512(a)(2)	Tampering with a Witness	01/19/2005	4s

The defendant is sentenced as provided pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

X Count(s) 1 of the original indictment X is [ ] are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

04/27/2006
Date of Imposition of Judgment

/s/ Philip G. Reinhard
Signature of Judge

Philip G. Reinhard,
U.S. District Judge
Name and Title of Judge

May 1, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term 262 Months

(120 Months on Count 1s; 120 Months on Count 2s to run consecutive to the term on Count 1s; 22 Months on Count 3s to run consecutive to the terms on Counts 1s & 2s; & 120 Months on Count 4s to run concurrent with the terms on Counts 1s, 2s, & 3s)

X The court makes the following recommendations to the Bureau of Prisons:

1. Defendant should receive mental health evaluation and treatment consistent with the evaluations already taken at the state and federal levels. 2. Because of defendant's behavior during the proceedings in this case, his security level should be closely evaluated. 3. Defendant should participate in a comprehensive drug program.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 Years

(Concurrent on Counts 1s, 2s, 3s, & 4s)

STANDARD CONDITIONS OF SUPERVISION

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and random drug tests conducted thereafter by probation officer not to exceed 104 tests per year.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. Defendant shall receive drug, alcohol, and mental health aftercare under direction of the Probation Officer.

2. Defendant shall not have any contact in any way personally or by any agent those who he threatened and who testified against him, specifically: Mike Perez, Sarah Woolbright, Jason Lakhani, Jami Carlson, and Jamie Maylum.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$ 400.00**	**$ 500.00**	**$ —**

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal*

Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
TOTALS	$ _____	$ _____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

X The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

X the interest requirement is waived for the X fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B X Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

a Ruger P89 9mm pistol, serial number 314-63817

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

If defendant receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, defendant is required to apply the value of such resources to any restitution or fine still owed.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.S.G. § 2A2.1. Assault With Intent to Commit Murder; Attempted Murder

(a) Base Offense Level:

(1) 33, if the object of the offense would have constituted first degree murder; or

(2) 27, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) the victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.

U.S.S.G. § 2J1.2. Obstruction of Justice

(a) Base Offense Level: 14

(b) Specific Offense Characteristics

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.

(2) If the offense resulted in substantial interference with the administration of justice, increase by 3 levels.

(3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by 2 levels.

(c) Cross Reference

(1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

SUPPLEMENT TO APPENDIX C

724. Amendment:

* * *

Appendix A (Statutory Index) is amended by striking both line references to 18 U.S.C. § 554 as follows:

* * *

in the line reference to 18 U.S.C. § 1512(a) by inserting ", 2A2.2, 2A2.3, 2J1.2" after "2A2.1";

* * *

Reason for Amendment: This amendment makes various technical and conforming changes to the guidelines.

* * *

Fourth, the amendment addresses statutory changes to 18 U.S.C. § 1512 (Tampering with a witness, victim, or an informant) made by the 21st Century Department of Justice Appropriations Act, Pub. L. 107-273, by deleting in Appendix A the references to §§2A1.2 (Second Degree Murder) and 2A2.2 (Aggravated Assault) for violations of 18 U.S.C. § 1512(b), and adding those guidelines as references for violations of 18 U.S.C. § 1512(a). The amendment also adds a reference to §2J1.2 (Obstruction of Justice) for a violation of 18 U.S.C. § 1512(a) to reflect the broad range of obstructive conduct, including the use of physical force against a witness, covered by that subsection.

* * *

Effective Date: The effective date of this amendment is November 1, 2008.

* * *

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18 U.S.C.A. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. –

(1) In general. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing

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[1] So in original. The period probably should be a semicolon.

guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses. –

(A)[2] **Sentencing.** – In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless –

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that –

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28,

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[2] So in original. No subpar. (B) has been enacted.

taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence

imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence. – The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

> **(1)** is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> **(2)** is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall

provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. – Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall –

> **(1)** permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;
>
> **(2)** afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and
>
> **(3)** include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion

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[3] So in original. The second comma probably should not appear.

employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. – Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that –

> **(1)** the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 04 CR 50068
	)	Rockford, Illinois
Plaintiff,	)	Thursday, June 4, 2009
	)	10:30 o'clock a.m.
v.	)	
DAVID ENGLAND,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE PHILIP G. REINHARD

APPEARANCES:

For the Government: HON. PATRICK J. FITZGERALD
United States Attorney
(308 West State Street,
Rockford, Illinois 61101) by
MS. MONICA V. MALLORY
Assistant U.S. Attorney

For the Defendant: FOLEY & LARDNER
(321 North Clark Street,
Suite 2800,
Chicago, Illinois 60654) by
MR. THOMAS R. MIKRUT
MS. JOANNE LEE
MS. ELLEN WHEELER

Court Reporter: Margaret M. Ciembronowicz
2308 Oxford Street
Rockford, Illinois 61103
(815) 494-9461
CSR License No. 084-003833

* * *

[38] THE COURT: All right. The court has taken about a 15-minute recess and considered all of the matters that I felt were necessary, and so I'm ready to make my sentencing decision.

First of all, what I've considered is the entire record of the proceedings at the original trial and the sentencing hearing, including the presentence report, which I have just re- – I had reread before today, and his psychological examination report. I've also considered the record at the first sentencing, resentencing hearing, and the statements of the lawyers for both sides and the defendant at that resentencing hearing. I've considered the statements of all the lawyers and the defendant at this resentencing hearing. I've considered the two opinions of the Court of Appeals, and, of course, I've considered Section 3553(a) factors.

[39] Now, the applicable guideline range for his conviction is 210 to 262 months based on a total offense level of 33 and a criminal history of one. The total offense level is based on the guideline range in effect at the time of his sentencing and is the law of the case through two Court of Appeals' decisions. I now must apply the 3553(a) factors to the advisory

guideline range to determine defendant's sentence. I am proceeding on resentencing without consideration or reliance on my improper comments on Pages 71 and 72 of the sentencing transcript and quoted in the last opinion of the Circuit Court of Appeals for the Seventh Circuit. I had no facts supported by a preponderance of the evidence which supported my statements that defendant would have attempted murder while out on bond or is like an attempted murderer. Further, those statements had no influence on my ultimate decision of imprisonment imposed then or now. It was a brief, improper characterization to emphasize defendant's potential dangerousness already fully explained in my 3553(a) factor findings of some eight pages in the sentencing transcript which augmented my findings and statements of reasons on the 3553(a) factors [40] made at the time of the original sentencing.

I now adopt my analysis and findings on the 3553(a) factors contained in the transcript of the prior resentencing hearing, excluding my improper comments causing this remand. Those findings extensively and fully analyzed all the Section 3553(a) factors, including factors A6 and the subsequent amendment of the guideline calculation for Section 1512(a) offenses. There is no need to restate those findings as the Court of Appeals wrote in its decision. When these findings are weighed applying the 3553(a) factors and the guideline amendment to Section 1512(a) which creates a substantial lower guideline range then 2A1 – 2A2.1. In my sentencing discretion, I still

impose a total sentence of imprisonment of 210 months and find no basis for a downward variance, but to the contrary, a substantial sentence of imprisonment is necessary as set forth in my prior findings. I acknowledge the defendant's arguments for a lower sentence, in particularly his prior – the prior testimony of his family, that they did not fear him, and that he was merely blowing off steam in his threat against his brother-in-law. However, his background, the forensic psychologist's report which [41] extensively discusses, particularly at pages five through eight, defendant's volatile and hostile personality traits as well as his demonstrated propensity to act confrontationally and violently in certain circumstances, and the evidence of violence in his assault of others relevant to count one, far outweigh the defense arguments for a lower sentence.

Defendant today continues to minimize the seriousness of his conduct, particularly the facts surrounding count one, and his prior background. I believe that Mr. England was untruthful in his trial testimony and continues to do so in respect to his use of the gun and that he was a government informant.

The sentence that I'm imposing now is at the low end of the applicable guideline range. It's a substantial sentence, but it in particular recognizes that defendant is volatile and dangerous through his prior history, before the original sentencing, and the strong need to deter him and protect the public in the future for all the reasons set forth in my prior analysis of the 3553(a) factors.

Mr. England has probably spent more time before me throughout the trial and sentencing [42] and resentencing than most other defendants. My sentencing decision today is not based on any bias against him or that he has successfully challenged some of my decisions, rather in my unique position as a trial judge and in exercising my sentencing discretion, I find a substantial sentence of imprisonment as imposed is necessary for Mr. England. I hope he receives the mental health treatment in the BOP that is necessary, and I hope that he takes the positive approach to such treatment.

My complete sentence then is – on resentencing is as follows. On count one, he's sentenced to 120 months imprisonment. On count two, 90 months imprisonment, consecutive to count one. Count three, 120 months imprisonment concurrent to counts one and two, and count four, 120 months imprisonment concurrent to counts one and three. Again, that makes a total sentence of imprisonment, adding counts one, 120 months, and count two, which it is consecutive, to 210 months. All the other terms of his original sentence and the forfeiture judgment are reimposed; that is, three years' supervised release concurrent on all counts. He will be subject to, on supervised release, the [43] standard written conditions and the special conditions exactly as set forth in the original sentencing order. He will be assessed the same fine of $500, and the $400 special assessment. And as I said, the forfeiture judgment is reimposed. I will recommend to the Bureau of Prisons that he

receive mental health evaluation and treatment. I recommend that he be placed in a comprehensive drug program, and I'll, if his – if his lawyers are asking, I'll recommend that he be placed at Oxford. I don't know where he is now.

MR. MIKRUT: Yes, Your Honor. He's now placed in Atlanta.

THE COURT: All right.

MR. MIKRUT: And we would ask the court to recommend that he be placed at Oxford.

THE COURT: All right. I will recommend that he be placed at Oxford, Wisconsin, so that he can be closer to his family, which I consider to be a part of the rehabilitative process if you can be nearer home.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 04 CR 50068
	)	Rockford, Illinois
Plaintiff,	)	Monday, June 2, 2008
	)	9:00 o'clock a.m.
v.	)	
	)	
DAVID ENGLAND,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE PHILIP G. REINHARD

APPEARANCES:

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MR. THOMAS R. MIKRUT
MR. MARTIN J. BISHOP

Court Reporter: Mary T. Lindbloom
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* * *

[59] THE COURT: All right. The court is ready to pronounce its resentencing decision. It's going to take a little time. I've spent a lot of time on this over the weekend, and I wanted to digest what the lawyers and Mr. England had said this morning and I've reached my decision, and I have the obligation to explain that decision, and I'm going to do that fully.

First of all, this matter was remanded for resentencing for my failure to actively consider 3553(a)(6). The Court of [60] Appeals did not reach the reasonableness of the sentence, but did hold that the guidelines that I calculated were correctly calculated, even though they found that there might have been a scrivener's error.

And on the original record of this case, this court did consider the difference and disparity between 2J1.2 and 2A2.1. As I said earlier today, I was the one who initiated this issue because of that significant difference, and I said that it was – that I had some difficulty with it. What I meant was that there was such a significant difference, and because it appeared under the facts of this case that it appeared to be more under 2J2.2 rather than 2A2.1, I wanted it briefed.

Ultimately, that was the right decision; although, the Court of Appeals said I should have discussed (a)(6) when I reviewed all the other 3553(a) factors, and I acknowledge that I did not discuss that in the detail I would have preferred, and, therefore, I can understand why it was sent back for resentencing.

I did say that even if 2A2.1 was not the correct base offense level that I would consider some sort of an upward departure under the factors in 3553(a). So, that was at least pointed out by me, but I did not make an analysis as to how far I would have departed upward or not. And when I say departed, the word is really vary the sentence upward.

So, for this remand I'm considering all the evidence [61] that I considered and the arguments made at the original sentencing hearing, which include the PSR and all the proceedings before me, including the trial proceedings. Also I'm considering the position papers filed by the lawyers in this remand proceeding and the arguments that were made today and the defendant's own statement in elocution. And I'm applying all the facts and the existing case law and the relevant statutes and the guidelines in existence at the time of the sentencing, as required under 18 U.S.C. Section 3742(g).

The guideline range determined by me at the original sentence using the November 2005 guideline manual was 210 to 262 months based on a total offense level of 33 and a criminal history category of five, which was based on ten criminal history points.

The Court of Appeals decision, based on the only issue raised in the opinion as to the guideline calculation of 2A2.1 is the correct base offense level, ultimately agreed with my calculation and is the law of the case.

Defendant – and this is on Page 4 of the position paper – argues that the criminal history points should be recalculated to nine points, resulting in a criminal history category of four, based on a later 2007 guideline amendment affecting a prior conviction that the defendant had for reckless driving, which defense counsel says results in a reduction of one point in his criminal history points to a criminal history category of four.

[62] However, the amendment to 4A1.2(c)(1), while applicable beginning November 1st, 2007, and thereafter, that was not the guideline in effect at the time of sentencing. Section 3742(g)(1) provides that – and I'm referring to subsection (g) specifically – a district court to which a case is remanded pursuant to subsection (f)(1) – and this was remanded pursuant to (f)(1) – shall resentence the defendant in accordance with Section 3553(a) and with such instructions as may have been given by the Court of Appeals, except that in determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to Section 994(a)(1) of Title 28, United States Code, and that were in effect at the date of the previous sentencing of the defendant prior to the appeal,

together with any amendments made by any act of Congress that was in effect on such date.

So, it's clear to me that even though the one point may be changed if I were to sentence him today on an original sentence, it is a resentence, and I must apply the guidelines that were in effect, and that includes the criminal history guideline calculations at the time of his sentence.

I know that in a footnote the defendant's counsel have cited a different section, which is applicable only to sentencing, not to resentencing, and they've cited a case which, quite frankly, is not applicable, and, therefore, we're [63] proceeding at least on the guidelines that I've just said, which call for 210 to 262 months' imprisonment. At least that's the calculation.

Now, I have to find out or determine here whether applying the 3553(a) factors, that's the correct guideline range or whether I should – or he should be sentenced within the guideline range or should I grant a variance downward.

First of all, I will find that the proposed amendments to Appendix A statutory index to add a reference to Section 2J – is it 2.2 or 1.2?

MS. MALLORY: 1.2.

THE COURT: 1.2. For an 18 U.S.C. Section 1512(a) offense, while not in effect yet, I will consider that as it relates to subsection (a)(6), unwarranted disparities factor, and the Court of Appeals' suggestion of a scrivener's error.

In making my sentencing determination today, I, first of all, would adopt my findings and statements of reasons on the 3553(a) factors which I made at the time of the original sentencing, as far as they go, and I'm going to augment those findings as follows.

As to the nature and circumstances of the offenses here that he's been convicted on, they certainly are aggravated. The felon in possession of a weapon charge in and of itself is a little extraordinary or aggravated because here he not only possessed the weapon in Count 1, but he also threatened to use [64] it against someone. So, that is an aggravation, that he possessed a loaded firearm and threatened Jason Lakhani in anger. And I find, as the jury found, despite defendant's continued disagreement, that he returned, he returned with a firearm, he broke windows, which he does admit, but that that firearm was fired again. But those factors surround the felon in possession.

Then what he does is he gets in state jail, and in order to try to avoid a successful prosecution for the felon in possession charge, he then aggravates everything by tampering with evidence, by asking witnesses to either get rid of his car, which contained the weapon, or make an alibi for him, and he also eventually threatened to kill his brother-in-law, but, of course, that was not communicated to the brother-in-law, and the brother-in-law stated on the record that he would have taken it just as blowing off steam, that that's just how the defendant is. I will discuss that a little bit later.

But I certainly agree that the defendant is a volatile person, that his prior history shows that, and the prior history also shows that he has possessed a weapon in the past, and, therefore, the facts of this case are aggravated, no matter where they fall within the base offense level.

Defendant's criminal history and characteristics is another factor under 3553(a), and I have reread those convictions and his history, both the mental health history, as [65] well, and the forensic report. And first of all, his background does show a pattern of unlawful conduct. It's been abusive. He's been belligerent. And the psychological report shows that he's got an antisocial personality disorder and an obsessive compulsive disorder.

And he is one who is oftentimes angry, demanding, and is irritable, and I think we've seen some of that in court. I've been here for the whole trial and the pretrial matters and now for the sentencing, and he has reacted in various antisocial ways against his lawyers. He's been pretty respectful in court; although, from time to time he's expressed his irritation with me, but that's what I'm paid to understand. It doesn't bother me, but what I am saying is that his personality has come across in court and sometimes is very antisocial and angry, and that is a part of his characteristics.

It's established, at least by the forensic psychologist, that his antisocial personality disorder is chronic and pervasive, and it is actually the preferred

personality style, and it's not likely – that he wants – and it's not likely to remit, and defendant appears comfortable with these types of interactions, that is, meaning confrontational.

The mental and emotional health section of the PSR confirms his antisocial nature and threatening nature. He has a long history of conduct of unlawful behavior, and that's evident from the PSR and is accurately set forth in the PSR. And I've [66] said already that I consider only convictions and that I will consider as reliable the circumstances of those convictions that are described in the PSR as the underlying factual basis.

All of these convictions and the circumstances of his crimes and his personality traits show a person who can be dangerous, especially if he's angry, and it does show that he goes beyond mere threats; that at least when he retaliated on the unlawful use of weapons charge, he pulled a weapon and threatened somebody. So, he does become angry.

In the testimony from his relatives, they all state that he becomes angry, especially his mother said when he's on drugs or alcohol. They all expressed, meaning his relatives, the fact that they still feel that he needs mental health care in order to control his anger. I've seen him in court. I've seen the reaction that on some occasions he's refused to come out – come to the court. When people – when he has a difference of opinion with people, he reacts in a way that his anger shows.

And I believe, Mr. England, that you did spit in the face of your trial lawyer, Mr. Ryan. You've said, well, he might have sort of had some water come from his mouth first, and I lost my – I think you said today that you shouldn't have spit at him. Well, that lawyer was just trying to help you, and I think it shows the nature and circumstances that you can react.

The court also in looking at the 3553(a) factors has to [67] again fashion a sentence that would reflect the seriousness of the offense and promote a respect for the law, and certainly I find that those offenses that he's committed in the past and in this case are such that I have to reflect a sentence that would reflect that seriousness. It's been a pattern of his behavior.

The sentence must also promote a respect for law, something that the defendant has lacked in the past, given his prior record, and even when on state probation at the time of this offense. So, that hasn't stopped him, the fact that he was on probation.

My sentence ultimately must reflect just punishment as the best I can. Certainly the sentence imposed must be imposed both to deter future criminal conduct on defendant's part and must be long enough to protect the public from the defendant. And this is something that bothers me. He is a defiant young man.

On the other hand, he has stood before me today and has been able to reasonably articulate his outlook on life, that he says when he gets out, he won't

commit violations and that he has always hung around with people who are in violation of various laws, and that's just the way they operate and that some of the witnesses who testified against him are worse than he is.

All I can say is that I am considering that factor, that I must deter him from letting his anger get the best of him, and I have to do that to protect the public. And as I've [68] stated, if he's out there driving when he's had some liquor or drugs and somebody crosses in an automobile his path, he very well may react in a road rage that would harm somebody else. So, I'm considering that, and from his psychological report, he has that tendency to be antisocial, especially when he perceives adversity from others.

I'm not overlooking some good things that his family has said about him, but the matter is that he does need mental health evaluation and counseling, and that can be provided in the prison, and maybe it won't be in his present setting. I hope he gets into a setting that would provide adequate mental health because I think when he focuses on something that's good, such as his desire to do something regarding aeronautical engineering, he may be able to focus on that and control himself, but he needs help in order to do that.

The next factor that I'm going to consider under the guidelines is (a)(6), and that specifically is the need to avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct.

First I find there certainly is a significant disparity between the base offense level for assault with intent to commit murder or attempt murder under 2A2.1, which is actually the correct base level to apply, and that obstruction of justice under 2J1.2, the base offense level that I'm comparing it to. Under 2A2.1 the base offense level is 33, whereas under 2J1.2, [69] the base level is 14, but a specific offense characteristic under (b)(1)(B) would enhance it eight levels to 22, and I believe that there's another two-level enhancement under specific characteristics that would have been 24. And if that's the case, the guideline range under the 2A2.1 is 210 to 262, and under the other guideline range it would be – that's a category five and a 24 – I think it's something to 115, is it not? Does the government have that?

MS. MALLORY: In category five.

THE COURT: 90 to – does the defense know that?

MR. MIKRUT: It's 92 to 115, your Honor.

THE COURT: 92 to 115. So, there is a significant difference.

The court would acknowledge that defendant's conduct under Counts 2 through 4 are for obstructive behavior, which appears to be more appropriately referenced under 2J1.2 and has now been made – will

be made express in the proposed revisions to the pertinent guidelines by the Sentencing Commission.

That being said, the court has to look at (a)(6) as to the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, and this factor, in my judgment, is to be balanced with all the other 3553(a) factors. And as recently stated in United States v. Orsburn decided in the Seventh Circuit in May, just a month or so ago, the best way to treat [70] similar situations alike and thus to avoid unwarranted disparities in sentencing is to start with the right guideline and make adjustments at the margin.

Thus, this court must apply 2A2.1, but recognizes that defendant's conduct is similar to that in 2J1.2. There's no statistical evidence of records of other defendants. So, it's difficult to say what the similar record is, but I do know his record, and that is something that I will address. So, suffice it to say that the court recognizes (a) (6) as a factor. The court must apply it and does so.

Now, having considered all the sentencing factors in 3553(a) that are pertinent to this defendant and considering the guideline range of 210 to 262 and the downward variance request made by defendant and the government's response, I make the following findings. Here the defendant committed, in my judgment, a violent crime in Count 1, not just the possession of a firearm by a felon, but also threatening and firing the firearm.

Next, as to the threat in Count 4, although that was not transmitted to the intended victim, there are multiple attempts to change witnesses' testimony, whether it be by the violence that was threatened in Count 4, but also in 2 and 3 by the conversations that he had with his family members. These are characteristics of one – and the tone of what he's done throughout the commission of these four offenses that he was [71] convicted of are more in line with a person who might attempt to murder someone.

Now, I say that, that if the defendant had been out on bond right after the state charge, a felon in possession, and he was angry with either his family's testimony or he was angry with those four witnesses, I think he would have gone and done something at least to those four witnesses in order to try to persuade them not to testify against him, and I have no doubt that he would have taken a weapon, and that would have been a substantial step that's necessary for an attempt offense of murder. I think he would have gone to what degree of force that was necessary to get them to drop the charges against him. Threats, shooting, whatever. And, therefore, in this respect he is more like the attempted murderer than someone who's just one who's obstructing justice.

Secondly, the defendant has indicated throughout these proceedings and throughout his past that he takes actions on his own. I think the fact that he said, "Well, I'll" – in court on several occasions – "Well, I'll settle this when I get out," and he's qualified that by

saying he's not going to settle it by force, that he would talk to them, I find that difficult to agree with, and I think that he becomes dangerous when he's angry and that, therefore, he is one who more closely fits the type of person who would commit a murder. His psychological and mental health history evaluations all indicate an antisocial and [72] defiant personality.

Therefore, the court in looking at these factors, I've considered (a)(6) and find that he is closer to the attempted murder than he is to the obstructive type of person, and this is based on all the factors and, therefore, a balancing of the factors. I have to do that, and, therefore, I've balanced all these factors, and for the reasons that I've just stated, I am finding that for the protection of society in particular and to deter him from crime, he must be imprisoned for a long period of time, and a just sentence is within the guideline range of 210 to 262 months. If he were in 2J2.1 and a lower guideline range, the court would vary the sentence upward to the same sentence that I'm going to impose for the same reasons that I've just indicated.

Now, I will acknowledge the disparity in the two base offense levels, and the court in balancing all the factors as it pertains to where I shall sentence him within the range, the court believes that while there should not be a downward variance, that revision in the subsection (a)(6) has influenced me somewhat, so that the court's sentencing discretion within the guideline range is going to be changed from his

original sentence. The defendant's sentence is as follows.

On Count 1 I am sentencing him to 120 months' imprisonment in the Bureau of Prisons. On Count 2 I am sentencing him to 90 months' imprisonment consecutive to [73] Count 1. In Count 3 I am sentencing him to 120 months' imprisonment concurrent to Counts 1 and 2. And in Count 4 I am sentencing him to 120 months' imprisonment concurrent to Counts 1 through 3. Therefore, the total sentence of imprisonment is 210 months.

All the other terms of the original sentence are reimposed, that is, the three-year term of supervised release on all counts to run concurrently, the standard conditions of supervised release are reimposed, and all the special conditions are reimposed, and without reading them now, they are reimposed in the same language, copying the same language in the original judgment and conviction document.

I am imposing the same $500 fine. It may have been paid by this date. I don't know. And reimposing the $400 special assessment, which may or may not have been paid by this time. And I'm imposing the forfeiture finding.

The court also will recommend to the Bureau of Prisons that he receive mental health evaluation and treatment. The second recommendation I will make to the Bureau of Prisons is that he be placed in the comprehensive drug program. And, finally, the court will recommend that he be placed at a Bureau of

Prisons facility, preferably Oxford, Wisconsin, so that he can be closer to his family, which the court believes is part of his rehabilitation and part of any mental health treatment.

Those are the conclusions of the court.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DAVID ENGLAND, Defendant.	Docket No. 04 CR 50068 Rockford, Illinois Thursday, April 27, 2006 9:30 o'clock a.m.

VOLUME 2
TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE
PHILIP G. REINHARD

APPEARANCES:

For the Government:	HON. PATRICK J. FITZGERALD United States Attorney (308 West State Street, Rockford, Illinois 61101) by MS. MONICA V. MALLORY MR. JOHN G. McKENZIE Assistant U.S. Attorneys
For the Defendant:	MR. DENNIS J. RYAN (4414 West Regent, Madison, Wisconsin 53705)
Also Present:	MS. TINA CACCIATORE Probation Office

Court Reporter: Mary T. Lindbloom
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* * *

[77] THE COURT: My first job will be to rule on the motion for downward departure as it relates to the guidelines, and that's the pro se motion that was filed by defendant. I'm also considering that motion as a motion for variance, but first I want to determine whether there's any valid basis under the guidelines for a downward departure.

I've looked at what he's stated. First of all, he states he has heart problems, back problems, needs treatment for those medical problems. There's no basis for a downward departure that they can't be treated in the Bureau of Prisons.

Secondly, the defendant states that he's working for state police, DEA Agent Donovan at the time the defendant got arrested. Defendant's life is being threatened by other inmates because he worked for the Rockford police in the year 2000 and 2002. I don't have any valid information that he's been threatened while in custody. In addition, I think –

DEFENDANT ENGLAND: I've been put in seg the whole time.

THE COURT: I think it has been shown that he was not working for Agent Donovan. He was working from time to time in a capacity for other law

enforcement agencies, however good or bad that ultimately was. There's no evidence that this is a basis for a downward departure under the guidelines.

Defendant states that he has a diminished mental [78] capacity, along with a compulsive disorder, along with other mental problems that he could not get treatment for, and that he was beaten by his father when a kid. In the federal system we have aid through mental evaluations and other mental counseling that will assist him. There's no evidence of a diminished mental capacity. I had him examined. I've reread the report prior to coming in here, a forensic report that was filed or dated September 15, and there's no basis in there that he has a diminished legal or mental capacity.

The defendant also says he completed two years of college in the year 2003 and the year 2004. I think that's commendable. I've read the records. He was in welding school and enrolled in an aviation course at the time this occurred. I've considered that, but it's no basis for a downward departure.

The defendant also states as a basis for a downward departure that his mother's window was broken out, and he feared for his mother's life. And he was working for the police. He thinks it might have been because he was working for the police that his mother's window was broken out. Again, that's no valid basis for a departure.

Defendant states also that he shouldn't have been charged with threatening his brother-in-law

because they were just mad at each other and because the defendant's brother-in-law told the police wrong information, which caused [79] the defendant to get mad. That's no basis for a downward departure. He was found guilty of the offense. He did make the threat.

The defendant also states that he was just stressing a point to his sister when he said that she should say that she was with him. That's not a basis for a downward departure. He was found guilty of that offense.

The defendant also raises that he was under stress and having mental problems and alcohol problems along with money problems at the time of his arrest, and I will consider that, but that's no basis for a downward departure.

Finally, the defendant states he needs to take care of his two-year old son. That's no basis for a departure. There's no circumstances given. That's the first time I know that he's got a two-year old son. I don't know whether it's truthful or not. He did tell the examining psychiatrist, Dr. Dana, that he had no children. In any event, I find no basis for a downward departure under the guidelines.

The next thing is should I based on the statutory 3553(a) factors give him a downward departure. The court is supposed to look at, first, the nature and circumstances of the offense. The nature and circumstances of the offense certainly don't support a downward departure. The defendant here had a

weapon, a loaded weapon that he shot, and I find that – the defendant disputes those facts, but I find that those are the [80] facts, and that he shot it in anger. He threatened violence earlier that evening against one of the people who testified. And then eventually he is convicted of tampering with witnesses, trying to get them to either give certain testimony or change their testimony. Change the testimony would relate to why he threatened his brother-in-law because his brother-in-law told the police when he was questioned that at one time he had a gun. As far as I'm concerned, that certainly doesn't support a variance downward. It might even support a variance upward.

The next is the history and characteristics of the defendant. The defendant has six adult criminal convictions. He has one for burglary, and that's a felony under state law. That was reduced from a residential burglary, in which he admitted a number of other burglaries.

Throughout the other convictions, even the unlawful use of weapons, he did not serve much time. And I'm talking about the unlawful use of weapon in state court. So, based upon the nature and circumstances and his history, certainly he doesn't deserve any variance downward.

This crime, as well, was a crime of violence. Not only did he threaten a witness, he fired the weapon in anger, and his relatives have testified that he does become angry, and he needs mental help, and I certainly agree that he needs mental evaluation, but,

more importantly, mental counseling, and he has to respond to that. But certainly there's violence in his past.

[81] He just threatened his brother-in-law, but other people he has threatened them with a weapon and did it in this case when he got angry, and I think he's a danger.

As to his characteristics which might support a variance downward, the court has looked closely at that, as well as the psychological examination. He's extremely antisocial nature. He is prone to threaten others, as shown throughout this proceedings. He's been antisocial to his attorneys. He's been antisocial to the court. He's refused to come out of the jail on occasions. He's refused to see his attorneys. He's also refused to obey court orders. He spit in his own lawyer's face – and I don't believe for one minute that his lawyer spit in his face first. Even taking what he said, if at the time the lawyer was talking to him, if some saliva might have hit him – and I don't think that happened – but I think the police report of the jail officials shows that he got mad and spit at his lawyer.

My conclusion is based on all this, all the 3553(a)(2) factors, there's no basis for a variance downward, and I feel that the 33 to five criminal history category is the appropriates one, and that the sentencing range will remain at 210 to 262 months.

Now it has to be the determination of the court as to where I'm going to sentence him in the range. You can have him step forward now.

* * *

[84] We've reached that point in time where I have to sentence you, and now I'm going to give you the reasons for my sentence.

Mr. England, you are an angry young man. You have some [85] mental problems. Those mental problems do not cause you to be such that you can't understand the nature of the charges against you or communicate with counsel. You are simply an anti-social person.

Now, why and how that develops is beyond my control. But you have been diagnosed as an alcohol abuser. You have a history of LSD abuse. You have obsessive compulsive disorder, and you are antisocial personality disorder.

You have had an examination that I think has been helpful to the court, but now you say, well, I just went along, and I didn't tell the truth when I was examined by Jason Dana. You are a compulsive liar, as well as compulsive in other areas.

Now, the question is whether you're a danger to society. I don't believe that you're a danger to your close relatives. Your parents, your sister, your brother-in-law. I think you are a danger to other people. And you were convicted of a felony, and as a felon you're not allowed to possess a weapon. You

possessed a weapon in a prior state court proceeding, and you were given lenient treatment for that. You then came into possession of a weapon in this case. You showed it to your brother-in-law, and now you're trying to deny it.

* * *

[95] THE COURT: All right. The court is going to – this [96] defendant needs help, and he's going to get it in the Bureau of Prisons. But I have no doubt in my own mind that he is a threat to other people. I listened compassionately to what his relatives said, and I feel sorry for them. They recognize that David England has a mental problem. But that mental problem is not one that he didn't know what he was doing and that he did it in this case.

I'm going to sentence him as follows. On Count 1 he will be sentenced to 120 months. On Count 2 he will be sentenced to 120 months consecutive to Count 1. On Count 3 he will be sentenced to 22 months consecutive to that in Counts 1 and 2, for a total of 262 months in the Bureau of Prisons. On Count 4 I will sentence him to 120 months concurrent with that of Counts 1 through 3.

I am recommending to the Bureau of Prisons that he be given mental health evaluation and treatment consistent with evaluations that have already been undertaken both at the state court level and at the federal level.

Two, based upon his threats to the witnesses and his history of violence and his uncooperative nature, I'm going to recommend that his security level be closely evaluated.

Three, I will recommend that he be placed in the comprehensive drug program so that he receives appropriate treatment for his problems.

I will sentence him to three years supervised release [97] on all counts concurrently following his release from imprisonment.

He shall have the standard written conditions. You shall have the following special conditions. One, you shall have drug, alcohol, and mental health aftercare under the direction of the probation officer.

Two, you shall not contact in any way personally or through any agent those who you threatened and who testified against you. Namely, Mr. Perez, Sarah Woolbright, Jason Lakhani, and Jami Carlson.

The court will impose a $500 fine. He has the ability to work while in the institution. I also will impose the $400 special assessment to be paid forthwith.

I have not made a forfeiture finding. The defendant did not contest this and agreed to a bench trial for that. It's clear he was convicted of possessing a weapon in Count 1. That weapon it's been proven to

me beyond a reasonable doubt should be forfeited, and I will enter a forfeiture finding as to that.

* * *